

BEFORE THE AGRICULTURAL MARKETING SERVICE  
UNITED STATES OF AMERICA DEPARTMENT OF AGRICULTURE

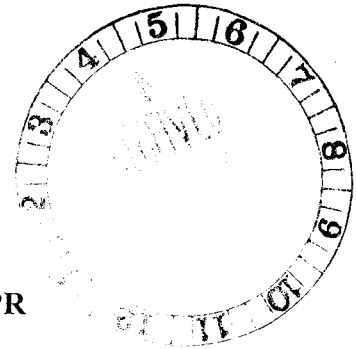
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In re:

**Proposed Rule: Grapes Grown  
in a Designated Area of  
Southeastern California and  
Imported Table Grapes;  
Proposed Change in Regulatory  
Periods**

**70 Fed. Reg. 30001  
(May 25, 2005)**

**Docket : FV03-925-1 PR**



**MEMORANDUM OF LAW IN SUPPORT OF THE COMMENTS OF THE  
ASOCIACION DE EXPORTADORES DE CHILE IN OPPOSITION TO THE  
PROPOSED RULE**

**INTRODUCTION AND SUMMARY**

This memorandum of law accompanies the comments of the Asociacion de Exportadores de Chile (ASOEX), also known as the Chilean Exporters Association, submitted in opposition to the Proposed Rule<sup>1</sup> that would change the beginning and ending effective dates of Table Grape Marketing Order No. 925<sup>2</sup> (Marketing Order 925) and the companion Table Grape Import Regulation No. 4<sup>3</sup> (Import Regulation 4) from April 20 to April 1. The proposed date changes lack a rational basis in the record described – but not completely disclosed – in the Proposed Rule. As noted in Section III and in previous filings on behalf of ASOEX, this rulemaking is

<sup>1</sup> See, Grapes Grown in a Designated Area of Southeastern California and Imported Table Grapes: Proposed Change in Regulatory Periods. 70 Fed. Reg. 30001 (proposed May 25, 2005) (to be codified at 7 C.F.R. pts. 925 and 944).

<sup>2</sup> 7 C.F.R. §925.1-925.304.

<sup>3</sup> 7 C.F.R. §944.503.

procedurally deficient and should be indefinitely suspended until such time, if ever, that the statutory requirements are fully observed.<sup>4</sup>

As shown in the comments of ASOEX and others opposed to the date changes, the Proposed Rule violates the statutory mandates of the Agricultural Marketing Agreement Act of 1937, as amended (AMAA).<sup>5</sup> More specifically, in contravention of AMAA objectives, consumers will be further deprived of a continuous and wholesome supply of several varieties of fresh table grapes from April to mid-May and into June when no significant commercial quantities of the same varieties are available from domestic or foreign producers other than Chile. Widening the supply gap in the April to mid-May/June period will also cause significant market distortions while cutting sharply into the U.S. retail grocery store industry's highly profitable winter fruit business. The Proposed Rule will also impose a non-tariff trade barrier in contravention of the World Trade Organization (WTO) agreements and the U.S.-Chile Free Trade Agreement (FTA).

The California Desert Grape Administrative Committee (CDGAC) and the Desert Grape Growers League of California (Desert Grape League)<sup>6</sup> unsuccessfully tried several times before to disrupt the supply of fresh table grapes from Chile and other countries in the late spring months. In 1987, the CDGAC asked USDA to change from May 1 to April 10 the beginning effective date of Marketing Order 925 and the companion Import Regulation 4.<sup>7</sup> In 1987 and today, no commercially significant pack-outs from domestic or Mexican producers occur before

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<sup>4</sup> See, letters to George Kelhart dated May 31, 2005, June 3, 2005, June 8, 2005, August 5, 2005, and August 30, 2005 incorporated herein by reference.

<sup>5</sup> 7 U.S.C. §§ 601 *et seq.*

<sup>6</sup> The membership of the two organizations is substantially the same.

<sup>7</sup> Grapes Grown in a Designated Area of Southeastern California and Table Grapes Imported into the United States; Proposed Change in the Effective Dates for Domestic and Imported Table Grape Requirements for the 1987 Season and Each Season Thereafter. 52 Fed. Reg. 432 (Proposed Jan. 6, 1987)(to be codified at 7 C.F.R. pts 925 and 944).

the middle of May, and for the Thompson variety until mid-June. In 1987, USDA finally rejected the request and stated that, “an April 10 date would provide for unnecessary regulation of imports ... *at a time when domestic shipments would appear to be remote.*”<sup>8</sup> (emphasis added).

Also in the late 1980’s, the Desert Grape League persuaded the County of Los Angeles to impose a disguised discriminatory tax in the form of inspection fees on Chilean table grape supplies when no comparable inspections or inspection fees were levied on Coachella or other domestically produced table grapes. The United States District Court for the Central District of California entered summary judgment against the County of Los Angeles and required the County to refund the illegal inspection fees with interest.<sup>9</sup> The USTR also questioned the legality of the county inspection fees.<sup>10</sup>

In 2002, the Desert Grape League filed an antidumping case against Mexico and Chile. The U.S. International Trade Commission threw out the case at an early stage, concluding that Chilean shipments had no significant effect on prices of domestic table grapes.<sup>11</sup> The ASOEX comments opposed to the date changes demonstrate the continuing absence of a significant effect by Chilean supplies on the prices of domestic table grapes that can be attributed to the alleged

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<sup>8</sup> Grapes Grown in a Designated Area of Southeastern California and Table Grapes Imported into the United States; Change in Effective Dates for Domestic and imported Table Grape Requirements for the 1987 Season and Each Season Thereafter. 52 Fed. Reg. 8865, 8870 (March 20, 1987) (to be codified at 7 C.F.R. pts 925 and 944).

<sup>9</sup> See, *Suma Fruit Int’l USA, Inc. v. County of Los Angeles*, No. CV-90-0577 (C.D.Cal. Jan. 23, 1991). The Order and a letter from Joshua Bolten, USTR General Counsel dated 12/28/89 are attached as Exhibit 1.

<sup>10</sup> See, letter dated 12/28/89 from Joshua Bolten, USTR General Counsel to Leon Spaugy, Agricultural Commissioner, Director of Weights and Measures, County of Los Angeles. Attached as Exhibit 1.

<sup>11</sup> United States International Trade Commission, Spring Table Grapes from Chile and Mexico Investigations Nos. 731-TA-926 and 927 (Preliminary), Determinations and View of the Commission; USITC Publication 3432 (June 2001). Exhibit 2 attached.

failure of these supplies to meet shipping point quality and condition standards upon entry at U.S. ports.

In May 2005, CDGAC has once again asked AMS/USDA to change the beginning and ending effective dates of Marketing Order 925 and Import Regulation 4, this time from April 20 to April 1 at the front end and from August 15 to July 10 at the back end. Once again, the request must be rejected.

**I. THE PROPOSED DATE CHANGES ARE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND UNSUPPORTED BY SUBSTANTIAL RECORD EVIDENCE.**

Section 706(2)(A) of the Administrative Procedure Act (APA), 5 U.S.C. §706(2)(A), requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>12</sup> As shown below, the record before the agency does not provide any rational basis for the date changes to Marketing Order 925 and Import Regulation 4.

**A. The Proposed Date Changes to the Beginning and Ending Effective Dates for Marketing Order 925 and Import Regulation 4 Contravene the AMAA Mandates.**

**1. The Proposed Change in the Beginning Effective Date Fails to Meet the AMAA Criteria.**

Under 7 U.S.C. §608c(1), USDA may issue and amend orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product specified in subsection (2), which includes table grapes. Under 7 U.S.C. §608e-1, USDA may impose, on the importation of commodities, the same minimum requirements for grade, size, quality, and maturity that apply to comparable domestic commodities under

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<sup>12</sup> *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

marketing orders, *whenever such marketing orders are in effect*.<sup>13</sup> USDA may also extend the coverage of a marketing order by a period not to exceed 35 days, if the Secretary determines that such additional period of time is necessary: (A) to effectuate the purposes of the Act; and (B) to prevent the circumvention of the grade, size, quality, or maturity standards of a seasonal marketing order applicable to a commodity produced in the United States by imports of such commodity.<sup>14</sup> Because these extensions of marketing order restrictions to a period when no domestic product is available have trade implications, such extensions are subject to additional statutory conditions expressly set forth in the statute. In addition, the AMAA vests review authority in the USTR over any regulation proposed by AMS/USDA.

In extending the period of a marketing order under the AMAA, the Secretary must consider:

- (A) to what extent, *during the previous year*, imports of a commodity that did not meet the requirements of a marketing order applicable to such commodity were marketed in the United States during the period that such marketing order requirements *were in effect for available domestic commodities*;
- (B) if the importation into the United States of such commodity *did, or was likely to, circumvent* the grade, size, quality or maturity standards of a seasonal marketing order applicable to such commodity produced in the United States; and
- (C) *the availability and price of commodities of the variety covered* by the marketing order during any additional period the marketing order requirements are to be in effect.<sup>15</sup>

(emphasis added). USDA, as a legal matter, must strictly comply with the specific statutory criteria. As we show, the Proposed Rule would violate the AMAA limiting conditions. The

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<sup>13</sup> See, 7 U.S.C. §608e-1(a).

<sup>14</sup> See, 7 U.S.C. §608e-1(b)(1).

<sup>15</sup> See, 7 U.S.C. §608e-1 (b)(2).

Proposed Rule would impose a beginning marketing order date that, on average, precedes the availability of *all* domestic varieties by more than 35 days.<sup>16</sup> In addition, the Proposed Rule will apply to import varieties from Chile when *none of the same varieties* are available in significant commercial quantities from domestic sources or foreign sources other than Chile. More specifically, the Proposed Rule will violate the statute by imposing marketing order supply restrictions on Chilean Thompsons and Crimsons at a time when no domestic supplies of Thompsons or Crimsons are available, and when no significant commercial quantities of any domestic variety are available.

We now analyze and apply the three statutory requirements to the Proposed Rule and show that the proposal must be rejected.

**(a) The Proposed Rule would extend the period covered by Marketing Order 925 and Import Regulation 4 in excess of the 35 day statutory limit.**

The AMAA does not permit the imposition of marketing order supply restrictions on Chilean grapes *under any circumstances* for more than 35 days prior to the availability of domestic supplies. As a preliminary matter, the statutory framework of the AMAA contained in 7 U.S.C. §608e-1 implicitly requires USDA to determine the base date from which an authorized 35-day extension may be counted. The base date, to be consistent with the statutory scheme, must reflect a date derived from the availability of domestic product. The Proposed Rule does not specify a base date, but seems to be drafted on the assumption that April 20 is the base date. However, for the purposes of the Proposed Rule, the base date cannot be April 20, because April 20 already precedes the historical average first pack-out date from Coachella by 18-21 days as

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<sup>16</sup> As noted, *infra*, pp. 32-33, the proposed change in the end date also discriminates against late season Chilean grapes and in favor of late season Coachella and Mexican grapes.

shown in the following Table 1 and Chart 1a and 1b.<sup>17</sup>

**TABLE 1**

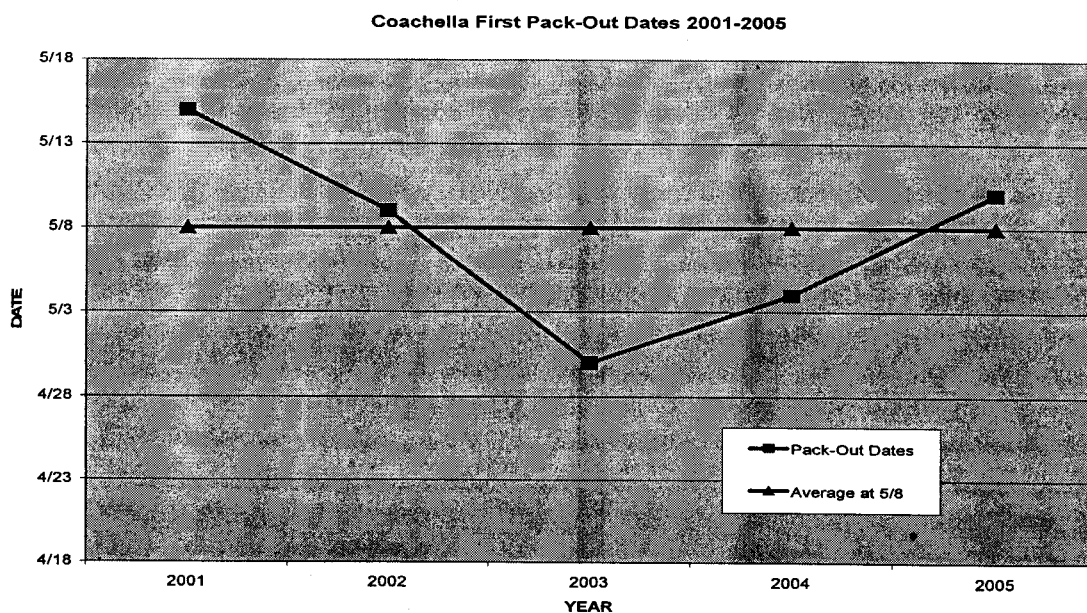
| YEAR    | First Pack-Out Date | Pack-Out Date (20,000 cases or more) | First Pack-Out Quantity (cases) | Average Daily U.S. Consumption of Table Grapes (cases)** |
|---------|---------------------|--------------------------------------|---------------------------------|--|
| 2001    | 5/15*               | 5/16                                 | Not reported                    | 334,000  |
| 2002    | 5/9                 | 5/13                                 | 11,293                          | 334,000  |
| 2003    | 4/30                | 5/2                                  | 6,579                           | 334,000  |
| 2004    | 5/4                 | 5/6                                  | 665                             | 334,000  |
| 2005    | 5/10                | 5/12                                 | 2,247                           | 334,000  |
| Average | 5/8                 | 5/10                                 |                                 |  |

\* USDA AMS Market News Portal shows that more than 100,000 cases were shipped on 4/25/01 and 4/28/01, but then shipment stopped until 5/17/01 at which time grapes were shipped in much smaller volumes. Because of this unusual pack-out pattern, the figure shown in 2001 CDGAC Annual Report was used.

\*\* Based on USDA, FAS, World Table Grape Situation and Outlook (April 2005), the U.S. consumes approximately 1 metric ton – equivalent to 2,200 million lbs – of table grapes annually. This amount is equivalent to approximately 122 million cases of table grapes per year, and 334,247 cases per day.

Source: California Desert Grape Administrative Committee Annual Report 2001-2004; AMS Fruit and Vegetable Market News Portal at <http://marketnews.usda.gov/portal/fv>.

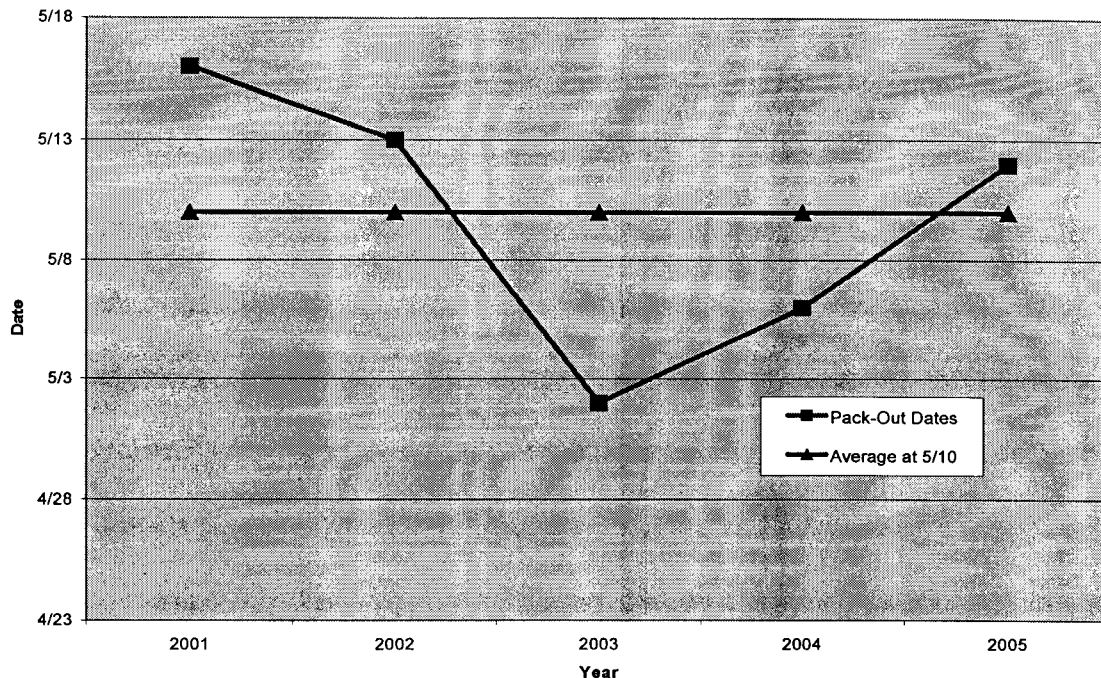
**CHART 1a**



<sup>17</sup> Even when shipments are reported by AMS Marketing News Reports, the prices of the Coachella Perlettes, the first variety to be shipped, do not get reported until mid-May when there is sufficient supply in the market.

CHART 1b

First Pack-Out in Reportable Quantities (20,000 cases or more)



Source: California Desert Grape Administrative Committee Annual Report 2001-2004  
AMS Fruit and Vegetable Market News Portal at <http://marketnews.usda.gov/portal/fv>.

The Proposed Rule omits any mention of a base date and lacks any analysis of how such a base date is to be determined. Clearly, however, the statute cannot be read as a progressive bootstrapping device to permit repeated extensions of the beginning effective date in 35-day increments. Such a reading of the statute would be contrary to the express statutory restriction that the Secretary may only impose a marketing order regulating a commodity under the AMAA when the commodity is actually available in interstate or foreign commerce.<sup>18</sup>

<sup>18</sup> See, 7 U.S.C. §608c(1) (“[Marketing] orders shall regulate ... only such handling of such agricultural commodity, ..., *as is in the current of interstate or foreign commerce*, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or produce thereof.”) (emphasis added).



Any other reading of the statute would render 7 U.S.C. §608e-1(b)(1) superfluous.<sup>19</sup> The section expressly limits the authority of the Secretary to extend the period that a marketing order's requirements can be applied to an imported commodity by 35 days prior to the time that the same domestic commodity becomes available in the market. Under even the most favorable reading of the statute to the Coachella request, the current Marketing Order 925 and Import Regulation 4 have already extended the effective beginning date by 18 to 21 days of the 35 days permitted by the statute.<sup>20</sup> The USDA lacks statutory authority – indeed, the USDA is expressly prohibited by the statute – to extend Marketing Order 925 and Import Regulation No. 4 by another 20 days for a total extension of 38-41 days. For that reason alone, the Proposed Rule must be rejected as contrary to the plain meaning of the statutory limitation.<sup>21</sup>

**(b) The rulemaking record does not – and cannot – show that *during the previous year*, Chilean fresh table grapes circumvented marketing order requirements that were in effect for *available domestic table grapes*.**

After the base date has been determined, the next step of the statutory framework requires the agency to evaluate marketing practices “during the previous year.” If the Proposed Rule were to go into effect in 2006, the previous year would be 2005. Data for the 2005 season was not available when the Proposed Rule was published, so the rulemaking record lacks the statutorily required analysis for a proposal based on “the previous year.” Until 2005 data is made available for analysis, no rule that changes effective dates can be promulgated without

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<sup>19</sup> See, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“[C]ourts should disfavor interpretations of statutes that render language superfluous.”).

<sup>20</sup> As noted, *infra*, pp. 6-8, the establishment of a base date on a variety specific basis would preclude any extension of the coverage period as applied to Chilean table grapes.

<sup>21</sup> See, *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-78 (1990) (“statutory interpretation begins with the language of the statute itself.”); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) citing *Richards v. U.S.*, 369 U.S. 1, 9 (1962) (“the legislative purpose is expressed by the ordinary meaning of the words used.”).

violating 7 U.S.C. §608e-1 (b)(2). The statute expressly requires an analysis of the marketing practices during the previous year.

If and when 2005 data is made available for public comment, the data must be analyzed on a varietal basis. The Marketing Order standards must be variety-specific, because inspection standards are variety-specific.<sup>22</sup> The *varieties* of fresh table grapes supplied by Chile have never been marketed at the same time as the same varieties become available from domestic sources. In April and May, Chile supplies end-of-season Thompsons and Crimsons. Historically, Thompsons are shipped out from Coachella on average in the first or second week of June.<sup>23</sup> No commercially significant overlap exists in the market between Coachella and Chilean Thompsons.<sup>24</sup> Coachella does not pack-out a sufficient amount of Crimsons to be separately reported by the California Desert Grape Administrative Committee or USDA. Therefore, the rulemaking record can never sustain a finding that during the previous year (or any year) Chilean supplies circumvented marketing order standards that were in effect for *available* domestic commodities within the meaning of the AMAA.

The data described in the Proposed Rule – but not made available at the time the proposal was published in the Federal Register – also fails to show that Chilean supplies circumvented marketing order standards in the U.S. during the time that available domestic table grapes were subject to the Marketing Order. The Proposed Rule describes, uncritically, the data provided by the Desert Grape League on voluntary USDA inspections performed on approximately 2 million

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<sup>22</sup> See e.g., 7 C.F.R. §51.884; 7 C.F.R. §51.888; Cal. Code Regs. Tit. 3, §1436.12.

<sup>23</sup> First pack-out dates for Coachella Thompsons are: June 2 for 2000, June 15 for 2001, June 10 for 2002, June 5 for 2003, June 2 for 2004 and June 16 for 2005. See, California Desert Grape Administrative Committee Annual Report 2000-2004; AMS Fruit and Vegetable Market News Portal at <http://marketnews.usda.gov/portal/fv>.

<sup>24</sup> As noted, *infra*, p.30, the presence of Chilean Thompsons that do not meet USDA No 1 shipping point standards at the time that Coachella markets Perlettes has no price effect on the Perlettes.

18-pound lugs of Chilean grapes that arrived at the Philadelphia port from April 1 through April 19 of 2004.<sup>25</sup> The Proposed Rule speculates that inspections resulted in high failure rates among Chilean imported grapes ranging from 53% to 78% in 2003, and from 42% to 57% during April 1-19 in 2004.<sup>26</sup>

The data is totally irrelevant. No domestic grapes of any kind are available from April 1 through April 20. To show “circumvention” of Marketing Order supply restrictions, Chilean grapes must be in the market at the same time as domestic grapes. The Proposed Rule appears to suggest that Chilean grapes failed inspection upon arrival, but were later marketed in competition with Coachella grapes.<sup>27</sup> However, the Proposed Rule does not contain any evidence that the failed grapes were marketed when domestic supplies were available in the market at the same time. Therefore, the data (even if it were not otherwise misleading and flawed) is irrelevant as it pertains to a time when no overlap in the market exists.

In addition, the inspection data obviously and fatally fails to prove anything because the Desert Grape League did not break down the data by variety and then compare it on a weekly basis to the total volume of Chilean arrivals of the same varieties. The cold storage survey conducted by ASOEX demonstrates that, in fact, Thompsons have cleared out of the market before any commercially significant volume is shipped from Coachella.<sup>28</sup>

The Proposed Rule also fails to note that both Crimsons and Thompsons in small quantities enter the U.S. after April 20 subject to the Import Regulation supply restrictions. These Chilean Thompson volumes clearly do not circumvent any Marketing Order supply restrictions. The Proposed Rule fails to show that any Chilean grapes entering the U.S. before

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<sup>25</sup> 70 Fed. Reg. at 30007.

<sup>26</sup> *Id.*

<sup>27</sup> *See, id.*

<sup>28</sup> *See infra*, pp. 16-17.

April 20 failed the inspection and were marketed simultaneously with Coachella grapes. The cited data are irrelevant, if they include the grapes entering subject to Import Regulation standards after April 20 that were then mishandled during transit and resulted in “the poorer condition” at destination. CDGAC has the burden to prove circumvention,<sup>29</sup> and the data cited in the Proposed Rule does not meet the burden.

Moreover, the cited inspection data do not support the rate of failure calculated by the CDGAC and the Desert Grape League even for the irrelevant period for which the data was compiled. Most of the U.S. companies that receive fresh fruit from Chile do not routinely ask for USDA inspections of all shipments on arrival (applying more stringent shipping point inspection standards to Chilean supplies). On the contrary, more typically, receivers ask for USDA inspections only for those shipments with suspect conditions.<sup>30</sup> Therefore, the sample inspection data cited in the Proposed Rule produce failure rates higher than would occur if all shipments of all receivers were surveyed.

A technical condition defect known as “shatter” ranks as the most frequent factor in the failure of Chilean Thompsons to make U.S. No. 1 shipping point standards. Shatter (berries falling off the stem) occurs during transportation of mature grapes. Typically, loose berries have a higher sugar content because of maturity. Only in the last decade have all table grapes been packaged, shipped and marketed in cellophane bags. Prior to the widespread use of cellophane bags shatter was an important defect because it caused shrinkage and possible slip-and-fall conditions in supermarkets. Under the current retailing practices, shatter no longer presents a significant problem for retailers or consumers; yet shatter continues to be included in grading

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<sup>29</sup> See, USDA, Economic Research Service, Criteria for Evaluating Federal Marketing Orders: Fruits, Vegetables, Nuts, and Specialty Commodities 69 (Dec. 1986).

<sup>30</sup> ASOEX Comment in Opposition at 18-19.

inspections, even though it is not an important consideration in retail chain buyer specification sheets. In fact, savvy retailers and consumers know that packages containing some shatter are likely to have sweeter and therefore more desirable fruit. The prices obtained for end-of-season Chilean Thompsons are generally strong and comparable to end-of-season Coachella Thompson prices, notwithstanding the occurrence of shatter.<sup>31</sup> As noted, produce buyers for major retail grocery store chains generally apply their own specifications, which are equivalent to, or higher than, the USDA No. 1 standards in most aspects. Obviously the grocery chains do not consider shatter to be a major marketing obstacle. Thus, USDA inspection failure rates do not necessarily indicate a quality or condition that will negatively affect prices, consumer confidence or goodwill.

Interestingly, Coachella grapes fail USDA inspections mainly because of immaturity. Immaturity accounts for approximately 60% of Coachella failures, and as high as 81% for Coachella Thompson failures and 63% for Coachella Perlette failures.<sup>32</sup> The inspection data strongly indicates that Coachella grape producers pick too early before the grapes can meet optimum consumer preferences for sugar content. Consumers prefer mature sweet grapes to immature sour grapes.<sup>33</sup> Coachella growers should be encouraged to let the grapes mature rather than rushing to a premature harvest. The Proposed Rule to advance the beginning effective date

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<sup>31</sup> See, ASOEX Comment in Opposition at 12; DecoFruit Analyses at 14-16, and Attachment 1 to Capital Trade Report attached as Exhibits 2 and 3 to ASOEX Comment in Opposition.

<sup>32</sup> Immaturity accounted for 49% for the total failures among Coachella grapes in 2000, 63% in 2001, 56% in 2002, 70% in 2003, 61% in 2004 with the 5-year average of 60%. Immaturity failures among Thompsons ranged between 53% to 92% for 2000-2004, with the 5-year average of 81%; immaturity failures among Perlettes ranged between 53% to 73% for 2000-2004, with the 5-year average of 63%. See, California Desert Grape Administrative Commission Annual Report 2000, at 20-22 (with supplemented data); Annual Report 2001 at 18-20; Annual Report 2002 at 18-20; Annual Report 2003 at 19-20; Annual Report 2004 at 19-20; ASOEX Comment in Opposition at 20.

<sup>33</sup> Associated Marketing, Differences in Usage of Selected Fruits by Season Part (prepared for the Chilean Fresh Fruit Association)(Spring 2001) at 26.

of Marketing Order 925 to April 1, therefore, can only be intended to exclude sweeter mature grapes from potential competition with immature Coachella grapes, contrary to retailer and consumer preferences. In fact, the minutes of CDGAC committee meetings from May show that CDGAC reported the prices of Coachella grapes in the beginning of the 2005 season as high, and that demand exceeded supply. Furthermore, the minutes of the meetings make it clear that CDGAC's main concern was to thwart the competition from Mexico and Chile.<sup>34</sup>

**(c) The rulemaking record does not – and cannot – show that the Chilean fresh table grape supply *did or was likely to, circumvent* the grade, size, quality or maturity standards.**

Before the beginning effective date of Import Regulation 4 can be extended for a period prior to shipments from domestic sources and applied to Chilean supplies, the statute requires a showing that shipments of Chilean grapes *did circumvent, or were likely to circumvent*, Marketing Order requirements applied to fresh table grapes produced in the United States.<sup>35</sup>

In an attempt to show “circumvention”, the Proposed Rule cites a survey of Chilean cold storage usage (SURRES survey) commissioned by the Desert Grape League. Like much of the information described in the Proposed Rule, the SURRES survey was not made available at the time the Proposed Rule was published. From the SURRES data, the Proposed Rule speculates that Chilean grape supplies were likely to circumvent the requirements of Import Regulation 4, because, according to the description of the SURRES data, receivers used cold storage facilities extensively during March and April for 30 to 60 days.<sup>36</sup> The Proposed Rule omitted to mention that the SURRES data were collected before the 1987 season. The 20-year-old SURRES study was submitted when the Desert Grape League first attempted to move the beginning effective

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<sup>34</sup> See, minutes of CDGAC committee meetings from May 16, 2005 and May 31, 2005, attached as Exhibit 3 hereto.

<sup>35</sup> 7 U.S.C. §608e-1(b)(2)(B).

<sup>36</sup> See, 70 Fed. Reg. at 30007.

date of Marketing Order 925 and Importer Regulation 4 from May 1 to April 10. The SURREs data are completely outdated for the purposes of the rulemaking because, among other reasons, the data show nothing about the previous year as required by the statute.

In addition to being out-dated, the SURREs cold storage study does not show circumvention because it does not break down, by week and by variety, domestic supplies that were available when grapes were sold from storage into the market. The AMAA conditions for extending the marketing order date are variety-specific; therefore, proof of circumvention must also be variety-specific. The SURREs study, as described, does not supply the relevant information in compliance with statutory requirements.

Furthermore, the 1987 SURREs survey has serious methodological flaws.<sup>37</sup> First, the survey does not show how long each lot of table grapes remained in cold storage. The SURREs survey asked only for the months that fruit was stored the longest, and the duration of the storage time for that month, i.e., how long was “the longest.” Averaging the responses will only give an average of the “longest” time the fruit remained in refrigeration, but no information as to how long on average the fruit remained in storage and no information as to whether stored grapes were sold into the market in competition with the same varieties of domestically available grapes. As a consequence, the CDGAC’s interpretation of the data is worthless and misleading.

Second, the SURREs survey does not show the percentage of the total Chilean grapes that the responding companies handled during the period surveyed. If the responding companies collectively handled a small and/or unrepresentative fraction of the total Chilean grape supply, the results are useless to show circumvention within the meaning of the statute. Third, in part because of these flaws, the survey does not report the quantity or percentage of Chilean grapes

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<sup>37</sup> See, ASOEX Comment in Opposition at 4-5.

that were actually sold into the market from cold storage after mid-May. Therefore, the SURRES data are irrelevant and useless for showing what effect, if any, the Chilean grape supply had on the market during the time that Coachella supplies were available in significant commercial quantities.

ASOEX conducted a cold storage survey of the largest receivers of fresh Chilean table grapes for the last three years, including the 2004-2005 Chilean marketing season. In contrast to the out-dated 1987 SURRES telephone survey, the ASOEX survey obtained and analyzed data that are meaningful and relevant to the statutory criteria that must be met for the proposed change in the beginning effective date of Marketing Order 925 and Import Regulation 4. The ASOEX survey accounts for 11-14 million cases of Chilean table grape supplies for the last trimester (week 12 to the season end) in the past three seasons, representing approximately 70% of the total Chilean shipments to the U.S. The ASOEX survey shows that more than 90% of the Chilean Thompson supply during the last trimester (week 12 to season end) cleared out of storage by mid-May, and are gone by the end of May.<sup>38</sup> The volume in the last trimester represents about 36% of the total Chilean supply for the season.<sup>39</sup> Extrapolated for the season, more than 94% of the total seasonal supply of Chilean Thompsons cleared out by the beginning

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<sup>38</sup> According to the survey, approximately 7.2% of the last-trimester Thompson supply remained in storage as of 5/10 and 2% as of 5/17 in 2003; 8% as of 5/8 and 1.2% as of 5/15 in 2004; 16% as of 5/7 and 7.1% as of 5/14 in 2005. 100% cleared by 5/31 in 2003 and 5/29 in 2004; 99.9% cleared by 5/29 in 2005. *See*, Attachment 4 to Capital Trade Report, attached as Exhibit 3 to ASOEX Comment in Opposition.

<sup>39</sup> According to USDA AMS Market News Portal, approximately 21 million cases entered in the last trimester in the 2002-2003 season, 15 million in the 2003-2004 season, and 20 million in the 2004-2005 season. The total Chilean arrivals are: approximately 50 million cases for the 2002-2003 season; 49 million cases for the 2003-2004 season; and 55 million for the 2004-2005 season. *See*, AMS Fruit and Vegetable Market News Portal at <http://marketnews.usda.gov/portal/fv>. Thus, the Chilean arrivals during the last trimester represents 36% of the season supply on average.



of May, 97-99% by mid-May, and were completely gone by the end of May.<sup>40</sup> The Flame variety virtually clears out by the end of April.<sup>41</sup> Over 90% of the Crimson season supply clears out of storage in the beginning of May, and virtually all are gone by the end of May.<sup>42</sup>

The earliest Coachella Flame shipments do not occur until the beginning of May.<sup>43</sup> Coachella Thompsons are not shipped until the beginning of June.<sup>44</sup> Coachella does not produce Crimsons in sufficient quantities to be separately reported. Thus, Chilean supplies do not overlap in the market with domestic grapes of the same variety. Even if Perlettes and Thompsons were deemed to be substitutes despite the fact that consumers usually differentiate between the two based on taste and berry size, the overlap between the two varieties is minimal.<sup>45</sup> Coachella does not ship Perlettes in commercially significant quantities until mid-May. In fact, USDA describes the historical average start of the Coachella grape season as

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<sup>40</sup> The figures shown in FN 38 can be translated into seasonal figures by multiplying by 36%. The results show that: 2.6% of the Chilean Thompson season supply remained in storage as of 5/15 and 0.7% as of 5/17 in 2003; 2.9% as of 5/8 and 0.4% as of 5/15 in 2004; 5.8% as of 5/7 and 2.6% as of 5/14 in 2005. Virtually all (99.99%-100%) were gone by the end of May.

<sup>41</sup> 99% of the Flame seasonal supply was shipped out of the storage by 4/26 in 2003, 4/24 in 2004 and 4/23 in 2005. *See*, Attachment 4 to Capital Trade Report, attached as Exhibit 3 to ASOEX Comment in Opposition. (The figures in Attachment 4 must be multiplied by 36% to be converted into seasonal percentages).

<sup>42</sup> 97% of Crimson seasonal supply cleared out of storage by 5/10 in 2003, by 5/8 in 2004, and 94% by 5/7 in 2005; 100% cleared by the end of May in 2003-2005. *See*, Attachment 4 to Capital Trade Report, attached as Exhibit 3 to ASOEX Comment in Opposition. (The figures in Attachment 4 must be multiplied by 36% to be converted into seasonal percentages.)

<sup>43</sup> The first pack-out dates of Coachella Flame Seedless are: May 5, 2003, May 7 for 2004 and May 16 for 2005. California Desert Grape Administrative Committee, Annual Report 2000-2004; AMS Fruit and Vegetable Market News Portal at <http://marketnews.usda.gov/portal/fv>

<sup>44</sup> California Desert Grape Administrative Committee, Annual Report 2000-2004; AMS Fruit and Vegetable Market News Portal at <http://marketnews.usda.gov/portal/fv>.

<sup>45</sup> Thompsons have larger berries and higher sugar content than Perlettes as reflected in the U.S. No. 1 shipping point standards. i.e. 15% soluble solids for Thompsons compared to 14% soluble solids for Perlettes as determined by titration at the 20 to 1 soluble solids-acid ratio. Cal. Code Regs. Tit. 3, §1436.12.

falling between May 15 and May 30.<sup>46</sup> In addition, the Coachella never supplies sufficient quantities to meet the market demand.

**TABLE 2**

| <b>YEAR</b> | <b>Month</b> | <b>Coachella<br/>Production<br/>(cases)</b> | <b>Mexico<br/>Production<br/>(cases)</b> | <b>Total<br/>Production<br/>(cases)</b> | <b>Average monthly U.S.<br/>consumption of table<br/>grapes (cases)*</b> |
|-------------|--------------|---|--|---|--|
| 2001        | April        | 269,596                                     | 0  | 269,596                                 | 10,200,000   |
|             | May          | 807,604                                     | 175,278                                  | 982,882                                 | 10,200,000   |
| 2002        | April        | 0   | 0  | 0                                       | 10,200,000   |
|             | May          | 2,435,456                                   | 501,166                                  | 2,936,622                               | 10,200,000   |
| 2003        | April        | 6,579                                       | 3,922                                    | 10,501                                  | 10,200,000   |
|             | May          | 3,277,566                                   | 6,882,086                                | 10,159,652                              | 10,200,000   |
| 2004        | April        | 0   | 0  | 0                                       | 10,200,000   |
|             | May          | 3,382,276                                   | 3,393,809                                | 6,776,085                               | 10,200,000   |
| 2005        | April        | 0   | 0  | 0                                       | 10,200,000   |
|             | May          | 1,855,397                                   | 5,305,778                                | 7,161,175                               | 10,200,000   |

\* Based on USDA, FAS, World Table Grape Situation and Outlook (April 2005), the U.S. consumes approximately 1 metric ton of table grapes annually – equivalent to 2,200 million lbs. This amount equals to approximately 122 million cases of table grapes per year, and 10.2 million cases on a monthly basis.

Source: AMS Fruit and Vegetable Market News Portal at <http://marketnews.usda.gov/portal/fv>.

As shown in Table 2, Coachella can supply, at most, about one-third of total average consumption per month. Even combined with the Mexican imports, the total Coachella-Mexico supply never satisfies the market demand in the month of April. About 30% of the market demand for May must be supplied by Chile.

Virtually no overlap exists in the market for Chilean and Coachella grapes. In the absence of an overlap, the record does not – and cannot – support a finding that Chilean supplies are likely to circumvent the Marketing Order standards.

<sup>46</sup> USDA's Noncitrus Fruits and Nuts 2004 Summary lists the beginning of marketing season for fresh California grapes as May 25. See, USDA, National Agricultural Statistics Service, Noncitrus Fruits and Nuts 2004 Summary 78 (July 2005). The May 8 date was referred to as "1-3 weeks earlier than normal." See, USDA Economic Research Service, Fruit and Tree Nuts Outlook 12 (FTS-312, Sept. 29, 2004).

**(d) The rulemaking record does not contain adequate consideration of *the availability and price of commodities of the variety covered by Marketing Order 925 during any additional period Marketing Order requirements are to be in effect.***

The third AMAA condition requires USDA to determine whether a change in the date would adversely affect the availability and prices of grapes if the regulatory period for imports were extended to April 1. The AMAA expressly instructs the agency to examine “the availability and price of *commodities of the variety* covered by the marketing order *during any additional period the marketing order requirements are to be in effect.*” 7 U.S.C. §608e-1(b)(2) (emphasis added).

Contrary to this statutory mandate, Coachella submitted – and the Proposed Rule contains – a cursory and anecdotal account of the availability and prices of grapes for a period *prior to* – not during – the availability of domestic supplies of the relevant varieties. The Proposed Rule merely cites, without any substantive analysis, anecdotal reports of prices of different varieties of Chilean grapes available in the U.S. market in May of 2002-2004 ranging from fifty cents a lug to ten dollars a lug.<sup>47</sup> Anecdotal data cannot satisfy the “substantial record evidence” test. Moreover, the anecdotal data is misleading. First, end-of-season grapes, whether supplied from Chile, Coachella, or Mexico, tend to fetch lower prices than during other parts of the shipping cycle.<sup>48</sup> End-of-season prices mean nothing standing alone. At a minimum, the prices must be compared to end-of-season prices for other producing regions. Second, the Proposed Rule does not tie any of the anecdotal reports to identifiable quantities, or show that the prices reported reflect below grade conditions of grapes that entered the U.S. prior to April 20 as opposed to small quantities of Thompsons or Crimsons shipped subject to Import Regulation standards after

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<sup>47</sup> See, 70 Fed. Reg. at 30004.

<sup>48</sup> See, Capital Trade Report at 3 and Attachment 1, attached as Exhibit 3 to ASOEX Comment in Opposition.

April 20.<sup>49</sup> Third, prices and conditions of grapes sold at auction terminal markets are irrelevant, as they do not reflect the shipping point conditions (i.e., conditions upon arrival at ports of entry), the relevant point for the purpose of the grading standards required under Marketing Order 925 and Import Regulation 4.<sup>50</sup> Product inspected at an auction terminal market may have been damaged or degraded when trucked from the port of entry or while being handled at a wholesale distribution center.

Moreover, the price data as described in the Proposed Rule does not reveal whether sufficient quantities of low-priced imported grape varieties depressed overall prices for specific varieties of domestically available grapes. Apparently, no data or study – whether methodologically rigorous or not – was undertaken to meet the AMAA requirement that such data be considered. In fact, USDA’s own report shows that Coachella grapes received “*record-high prices in May, the start of the 2004/05 marketing season*. At \$2,030 per ton, this average for the month was *more than double* the value of grapes in May 2003.” (emphasis added).<sup>51</sup> Therefore, the rulemaking record lacks an adequate basis for a determination that the quality or condition of the Chilean supply of fresh table grapes had any adverse effects on consumer confidence and satisfaction correlated to a decrease in demand or prices for Coachella grapes.

On the supply side of the equation, the Proposed Rule describes uncritically the information received from the Desert Grape League that “table grapes from some countries

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<sup>49</sup> See, *infra*, p. 11-12.

<sup>50</sup> See, 7 C.F.R. §51.886 (“Shipping point, as used in these standards, means ... in the case of shipments from outside the continental United States, the port of entry into the United States.”); 7 C.F.R. §925.304 (“During the period April 20 through August 15 each year, no person shall ... handle any variety of grapes ..., unless such grapes meet the requirements specified in this section.”); 7 C.F.R. §925.10 (“Handle is synonymous with ship and means to pack, sell, deliver, transport, or in any way to place grapes in the current of commerce within the production area or between the production area and any point outside thereof”)

<sup>51</sup> See, USDA Economic Research Service, Fruit and Tree Nuts Outlook at 12.

exporting to the United States must meet minimum inspection requirements on a year-round basis in both the European Union and in Canada.”<sup>52</sup> Without further explanation or analysis, the Proposed Rule claims that “a change in the effective date to April 1 should not affect the availability of imported table grapes because quality table grapes could easily be diverted to the U.S. market.”<sup>53</sup> The Proposed Rule does not disclose the actual data, if any, supporting this assertion. Nor was any data made available at the time the Proposed Rule was published. The Proposed Rule contains no mention of the specific varieties. Nor does the Proposed Rule contain any evidence that the so called “quality grapes” shipped to Europe and Canada would actually conform to USDA No. 1 shipping point standards at the time of arrival to Canadian or European destinations.<sup>54</sup>

Canada does not have a year-round “marketing order”, but only requires that imports meet “minimum grade.”<sup>55</sup> Under Consolidated Regulations of Canada, c.285, sections 3 and 51-56, imported grapes must meet the minimum grade of “Domestic Grade Standards,” a lower grade than Canada No. 1 Grade, which appears to be equivalent to U.S. No. 1. The EU marketing standards for table grapes also contain lower maturity and size standards than U.S. No. 1 standards.<sup>56</sup> The argument advanced by the Desert Grape League that so-called “quality table grapes could easily be diverted to the U.S. market” from Canada and EU is not supported at all.<sup>57</sup>

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<sup>52</sup> See, 70 Fed. Reg. at 30008.

<sup>53</sup> See, *id.*

<sup>54</sup> See, *id.*

<sup>55</sup> See, Canadian Food Inspection Agency, Plant Products Directorate, Food of Plant Origin Division, *Canadian Import, Export and Interprovincial Requirements for Fresh Fruit & Vegetables*, available at <http://www.inspection.gc.ca/english/plaveg/fresh/cdnrege.shtml>.

<sup>56</sup> U.S. No. 1 standards require that the weight of a bunch be no less than 1/4 pound (113.4 g), while EU standards require the weight per bunch to be no less than 100 g for “open grown table grapes.” Further, the EU maturity standard for all seedless grapes is 14° Brix (equivalent to percentage soluble solids), while the applicable maturity standards to imported grapes in the U.S. ranges from 14% to 17.5% depending on the grape variety. Compare 7 C.F.R. §51.884, Cal.

During the month of April, three varieties of Chilean grapes enter U.S. commerce in the following sequence dictated by the time of harvest – Flame Seedless, Thompson Seedless, and Crimson Seedless.<sup>58</sup> The Flame variety season ends in March.<sup>59</sup> Chilean Flames enter the U.S. only in small quantities in April until replaced by Chilean Crimsons,<sup>60</sup> Thus, the Proposed Rule has less of an impact on Chilean Flames than on other varieties. Chilean Crimsons have relatively less risk of failing to meet USDA No.1 shipping point standards upon arrival at U.S. ports because of their physical characteristics. In fact, Crimsons continue to arrive after April 20 subject to USDA No. 1 shipping point standards.<sup>61</sup> Thus, the availability of Crimson will not likely be affected by the imposition of inspection standards directly applied to the variety. However, Chilean Crimson supply will still be adversely affected to the extent that the exclusion of Thompsons will reduce the amount of fruit available and necessary to completely fill scheduled shipping capacity.<sup>62</sup>

In contrast, the Thompson variety seldom arrives after the beginning effective date of Marketing Order 925. The higher sugar content of late season Thompsons greatly increases the incidence of shatter and other condition defects. Substantial shipping charges for the two-week voyage from Chile to the U.S. are “sunk costs.” Accordingly, the risk of failure for Thompsons

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Code Regs. Tit. 3, §1436.12 and UNECE Standard FFV-19 available at [http://www.unece.org/trade/agr/standard/fresh/fresh\\_e/19grapes.pdf](http://www.unece.org/trade/agr/standard/fresh/fresh_e/19grapes.pdf).

<sup>57</sup> See, 70 Fed. Reg. at 30008.

<sup>58</sup> Decofrut Analysis at 12-22, Exhibit 2 to ASOEX Comment in Opposition.

<sup>59</sup> Decofrut Analysis at 19, Exhibit 2 to ASOEX Comment in Opposition.

<sup>60</sup> See, Decofrut Analysis at 17-22, Exhibit 2 to ASOEX Comment in Opposition.

<sup>61</sup> Decofrut Analyses at 20-22, attached as Exhibit 2 to ASOEX Comment in Opposition.

<sup>62</sup> The economics of marine reefer transportation require a ship to be filled to capacity before setting sail for a U.S. port. Otherwise, the unit costs of transportation become exorbitant. Consequently, the proposed date change will very likely reduce the supply to consumers of the many other varieties of Chilean fresh fruit that “ride along” with the Thompsons.

precludes shipments scheduled for arrival after the beginning effective date of the Marketing Order because of the greatly increased business risk.<sup>63</sup>

Until domestic and Mexican supplies become available in June, Chile is the only commercially reliable source for the Thompson variety, the only white seedless table grape available in the month of April. Therefore, a change in the beginning effective date for Marketing Order 925 and Import Regulation 4 will deprive consumers of the choice to buy this most popular white seedless table grape from April 1 until mid-June when Coachella and Mexican Thompsons become available.<sup>64</sup> If the Proposed Rule goes into effect, the additional Chilean supply of Thompsons that could be taken out of the market is estimated at 2.03 million cases.<sup>65</sup> The FOB value at ports of entry of that lost volume at an average price of \$11.67 per case<sup>66</sup> is approximately \$23.7 million. The retail value would substantially exceed this amount as retail prices generally average \$20.00 per case.<sup>67</sup> Even if the imposition of U.S. No. 1 shipping point standards do not directly affect the supply of other Chilean grape varieties, the exclusion of Thompsons may negatively affect the supply of other species of fruit which “ride along” with Thompson cargo.<sup>68</sup> Without doubt, the Proposed Rule would have a major negative effect on availability of fresh table grapes and other Chilean fruit in the U.S. market, consumer choice as well as retail profits.

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<sup>63</sup> ASOEX Comment in Opposition at 14.

<sup>64</sup> *Id.*

<sup>65</sup> DecoFrut Analyses at 23, attached as Exhibit 2 to ASOEX Comment in Opposition; Capital Trade Report at 10, attached as Exhibit 3 to ASOEX Comment in Opposition.

<sup>66</sup> An average shipping point price for Chilean Thompsons in April 2005. *See*, Capital Trade Report at 11.

<sup>67</sup> An average terminal point price for Chilean Thompsons in April 2005. *See*, USDA AMS Fruit and Vegetable Market News portal at <http://marketnews.usda.gov/portal/fv>.

<sup>68</sup> Chilean ships 46 varieties of table grapes and over 17 different species of fruit to the United States.

The Proposed Rule accurately notes that over 97% of the fresh table grape supply from February through April comes from Chile, only 1.6% comes from South Africa, and the remaining 0.8 % from various other countries.<sup>69</sup> The Coachella submissions as described in the Proposed Rule do not show – and cannot show – any replacement source for the supply of fresh Chilean Thompsons that the Proposed Rule would cut-off.

Curiously absent from the Proposed Rule is any analysis of supply to the U.S. table grape market in the month of May, especially under the April 1 scenario for the beginning effective date of Import Regulation 4. The April 1 date would very likely shift the source of supply to the U.S. market from current ship arrivals of fresh Chilean table grapes to significantly older cold storage inventories. If supplies from cold storage are more likely to result in lower quality and condition of grapes directly correlated to the length of time in storage, then it appears evident that the proposed change in date will be forcing consumers to accept either lower quality and condition grapes in April and May or to forgo table grapes entirely during that time. This will not promote goodwill among the consumers nor contribute to increasing demand, contrary to the legitimate objectives of Marketing Order supply restrictions.

**2. The AMAA Does Not Authorize a Marketing Order for a Period in Which the Domestic Commodity Is Not Available in the Market.**

Under 7 U.S.C. §608c(1), USDA’s authority to issue a marketing order is limited to regulation of “*only* such handling of such agricultural commodity,... *as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects*, interstate or foreign commerce in such commodity or product thereof.” (emphasis added). The plain meaning of the statute is clear: a marketing order may *only* regulate a commodity that is in the current of,

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<sup>69</sup> 70 Fed. Reg. at 30003.



or directly affects, interstate or foreign commerce.<sup>70</sup> Therefore, authority to issue a marketing order must be limited to regulation of an agricultural commodity that is actually produced and available in the market.

The rest of the language in this section amplifies the plain meaning of the limiting availability provision. Section 608c(6), for example, implicitly assumes that the subject commodity is produced or available in the market during the period when applicable marketing orders are in effect. Other relevant sections include terms such as: “limiting ... the total quantity of ... commodity ... *produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce* or so as directly to burden ... interstate or foreign commerce in such commodity... *during any specified period or periods by all handlers*,”<sup>71</sup> and “the amounts which each such handler has *available for current shipment*.”<sup>72</sup>

According to USDA’s Marketing News Reports, Coachella does not usually ship its earliest season grapes (Perlette variety followed by Flame Seedless) until mid-May.<sup>73</sup> The historical average start of the Coachella grape season occurs between May 15 and May 30.<sup>74</sup> No U.S. domestic table grapes have ever been available in the market in significant commercial quantities from April 1 to April 20; in fact, *no domestic grapes in commercially significant quantities are available on an historical average until mid-May, and no Thompsons are*

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<sup>70</sup> *American Tobacco Co.*, 456 U.S. at 68 (“the legislative purpose is expressed by the ordinary meaning of the words used.”).

<sup>71</sup> 7 U.S.C. §608c(6)(A).

<sup>72</sup> 7 U.S.C. §608c(6)(C).

<sup>73</sup> USDA AMS Marketing News portal shows that the earliest pack-out dates for Coachella grapes in reportable (but not necessarily sufficient) quantities were May 15 for 2001, May 9 for 2002, April 30 for 2003, May 4 for 2004, and May 10 for 2005; *see also infra*, p. 7-9, Table 1, Charts 1a and 1b.

<sup>74</sup> *See, infra*, pp. 17-18.

*available domestically on a historical average until June.* Furthermore, Coachella never supplies sufficient quantities to meet the market demand in May.<sup>75</sup> The Proposed Rule to change the beginning effective date for Marketing Order 925 and the companion Import Regulation 4 to April 1 is, therefore, invalid under 7 U.S.C. §608c(1). *Under the circumstances, the current beginning effective date should be rescinded as applied to Thompsons since there are no commercially significant quantities of domestically produced Thompsons in the market at any time that Chilean Thompsons are in the market.*

**B. The Proposed Rule Fails to Supply a Reasoned Analysis to Rescind the 1987 Finding That A Change of the Beginning Effective Date for Marketing Order 925 and Import Regulation 4 to a Date Before April 20 Would Constitute an Unnecessary Regulation of Imports at a Time When Domestic Shipments Would Appear to Be Remote.**

**1. No Change in Circumstances from 1987 Justifies a Beginning Effective Date Earlier than April 20.**

An agency, when changing its course, must supply a reasoned analysis for the change.<sup>76</sup> In 1987, USDA determined that an effective date earlier than April 20 would “provide for unnecessary regulation of Imports ... at a time when domestic shipments would appear to be remote.”<sup>77</sup> Nothing has changed from 1987 to May of 2005 that could justify a beginning effective date for Market Order 925 or Import Regulation 4 earlier than April 20.

The rationale of the Proposed Rule reiterates the rationale of the 1987 Final Rule that established the “permanent” beginning effective date of April 20. Then and now, CDGAC claimed that an earlier effective date for the Marketing Order was necessary because importers’ extensive use of cold storage allowed imported grapes that failed to meet USDA inspections to

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<sup>75</sup> See, *infra*, p. 18, for Table 2.

<sup>76</sup> See, *Motor Vehicle Mfrs. Ass’n of United States, Inc.*, 463 U.S. at 57.

<sup>77</sup> 52 Fed. Reg. at 8870.

be in the U.S. market after Market Order 925 went into effect.<sup>78</sup> Then and now, CDGAC relied upon the SURRES survey to support this view.<sup>79</sup> In fact, CDGAC relied upon exactly the same data submitted in 1987 without updating or supplementing it even though it was almost 20 years old. As noted, the SURRES survey has fatal substantive and methodological flaws.<sup>80</sup> Nothing submitted by CDGAC or cited in the Proposed Rule demonstrates a change in circumstance that warrants a change in the beginning effective date.

In fact, data compiled under the conditions imposed by the AMAA dictate no change in the beginning effective date, unless that change be a rescission of the April 20 date and re-establishment of the May 1 date. ASOEX submitted a current survey based on documented Chilean cold storage practices for the last three shipping seasons. The ASOEX survey compares favorably with the “telephone survey” underlying the outdated SURRES data. The ASOEX survey demonstrates that U.S. receivers and distributors clear Chilean fruit out of cold storage before any significant commercial quantities of Coachella and Mexican fruit are shipped to market.<sup>81</sup>

Nothing has changed from 1987 that warrants a beginning effective date earlier than April 20. Documented and properly analyzed data demonstrate that Chilean sourced fresh table grapes do not overlap with Coachella and Mexican grapes in the market. In 1987, AMS/USDA decided to establish the effective date at April 20, after determining that “there [was] *insufficient evidence supporting an April 10 date*”, and that “it [was] *doubtful*, on the basis of the evidence presented, *that shipments [would] occur as early as April 10 on a regular basis.*”<sup>82</sup> In

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<sup>78</sup> See, 70 Fed. Reg. at 30004; 52 Fed. Reg. at 8868.

<sup>79</sup> See, 70 Fed. Reg. at 30004; 52 Fed. Reg. at 8868.

<sup>80</sup> See, *infra*, pp. 14-16.

<sup>81</sup> See, *infra*, pp. 16-17.

<sup>82</sup> 52 Fed. Reg. at 8870.

proposing a beginning effective date earlier than April 20 in 2005, CDGAC failed to provide – and the Proposed Rule does not contain – a reasoned basis, supported by substantial record evidence, for the departure from the prior finding. In the absence of a reasoned explanation and substantial supporting record evidence, the Proposed Rule is invalid because it is arbitrary and capricious.

**C. The Proposed Beginning Effective Date of April 1 is Contrary to the Declared Administrative Policy of AMS/USDA.**

**1. The Proposed Rule Does Not Articulate a Rational Basis for a Beginning Effective Date Earlier than April 20 Consistent with USDA's Decisional Criteria.**

The Proposed Rule expressly references and then fails to apply the USDA's decisional criteria for evaluating whether a marketing order should be implemented as proposed. Specifically, the Proposed Rule references studies conducted by the USDA Economic Research Service.<sup>83</sup> A document entitled *USDA, Guidelines for Fruit, Vegetable, & Specialty Crop Marketing Orders* (Jan. 25, 1982) contains the most important of these USDA policy guidelines. The adoption of the Proposed Rule as a final rule, in the absence of satisfactory evidence in the record indicating declining consumer confidence resulting in the decreased demand for table grapes, will constitute a form of supply control at the expense of the U.S. consumers, which the USDA Guidelines specifically disfavors.<sup>84</sup>

Generally speaking, USDA approves marketing orders that establish quality and condition standards when justified to assure repeat customers.<sup>85</sup> According to this theory, when

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<sup>83</sup> See, 70 Fed. Reg. at 30008.

<sup>84</sup> USDA, *Guidelines for Fruit, Vegetable, & Specialty Crop Marketing Orders* 5-6 (Jan. 25, 1982).

<sup>85</sup> Nicholas J. Powers, *Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops*, Agricultural Economic Report No. 629 (USDA Economic Research Service), Mar. 1990, at 22.

consumers have a good quality experience, they make repeat purchases.<sup>86</sup> In other words, quality standards and grade requirements help build and maintain consumer goodwill and confidence, which if weakened by poor experience and disappointment, will decrease the demand for the produce.<sup>87</sup>

The Proposed Rule contains no evidence that consumer confidence and goodwill has declined because of the quality or conditions of fresh table grapes supplied by Chile during any period, and certainly not for the period relevant to Marketing Order 925 or the companion Import Regulation 4. In fact, U.S. table grape consumption per capita is stable at 7.72 pounds in 2003 and 7.65 pounds in 2004. Per capita consumption has increased a pound per capita over the last 10 years.<sup>88</sup> Therefore, USDA's own data show a solid demand for table grapes that has not been adversely affected by supplies from Chile.

Moreover, California industry studies have shown that the availability of a year-round supply made possible by Chilean shipments contributed to the increase of overall demand for the table grapes.<sup>89</sup> In fact, the fresh produce industry knows that global sourcing must be used to achieve a continuous year-round supply of table grapes. For this reason, most major factors in the industry (receivers, marketers distributors, and retail chain stores) source their table grapes globally, with California, Mexico and Chile being the primary sources of supply since their complementary growing seasons and rolling harvests allow for a continuous and adequate supply.

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See*, USDA, FAS, World Table Grape Situation and Outlook 4 (Apr. 2005); USDA FAS, World Table Grape Situation and Outlook 4 (Apr. 2004).

<sup>89</sup> *See*, Julian M. Alston, et al., The California Table Grape Commission's Promotion Program: An Evaluation 78 (unpublished July 10, 1996) ("California Table Grape Commission's Evaluation").

ASOEX commissioned an expert analysis by Capital Trade, Inc. to examine the extent, if any, to which the quality and condition of Chilean grapes depressed the prices of Coachella domestic table grapes.<sup>90</sup> The economic analysis confirmed that there were no adverse effects to Coachella grape prices in those weeks at the end of the Chilean marketing season when some overlap did exist between Chilean and Coachella grapes. If low-quality grapes from Chile had adversely affected market demand and prices for Coachella grapes, these effects would have been most pronounced during these short overlap periods.<sup>91</sup> Yet the analysis found no statistically significant adverse effects on the prices of Coachella grapes during these overlap weeks, for either red or white grapes.<sup>92</sup> On the other hand, the adoption of the Proposed Rule would have a negative effect on consumer prices, causing a sharp rise. The economic modeling shows that consumer prices of Thompson grapes could increase by \$9.75/case during this short period of time – a 84% increase, and the prices of Crimsons by \$8.74/case – a 61% increase, if the Proposed Rule were to be adopted, thereby further restricting Chilean fresh table grape supply to the U.S. market.<sup>93</sup>

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<sup>90</sup> See, Exhibit 3 to ASOEX Comment in Opposition for details.

<sup>91</sup> See, ASOEX Comment in Opposition at 11-12; Capital Trade Report at 9-10.

<sup>92</sup> See, *id.* The statistical analysis relied on econometric techniques, and evaluated the price effects during these overlap weeks, while at the same time evaluating the effects on price of other factors. The analysis necessarily had to aggregate red and green grape varieties, because there is virtually no temporal overlap between Chilean and Coachella grapes for specific varieties.

<sup>93</sup> See, ASOEX Comment in Opposition at 17; Capital trade Report at 10-11. These price effects could be somewhat less to the extent importers have some flexibility to hold Thompson grapes and Crimsons in cold storage for longer periods of time, which would mitigate somewhat the supply disruption.

**D. The Proposed Rule Violates the Terms of WTO Agreements and U.S.-Chile Free Trade Agreements.**

**1. Restricting the Supply of Fresh Chilean Table Grapes During a Period When No Domestic Varieties Are Available Constitutes a Non-Tariff Barrier Contrary to the Terms of WTO Agreements and U.S.-Chile Free Trade Agreement.**

Marketing Order 925 and the companion Import Regulation 4, if made effective on April 1 in the absence of significant commercial pack-outs of domestic grapes, will violate the terms of applicable WTO Agreements and the U.S.-Chile Free Trade Agreement (FTA).

The WTO Agreement on Technical Barriers to Trade (WTO TBT Agreement) defines “technical regulation” as a “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.”<sup>94</sup> Under Art. 2.2 of the WTO TBT Agreement, Members must “ensure that technical regulations are not prepared, adopted or applied with a view to or *with the effect of creating unnecessary obstacles to international trade.*” (emphasis added).<sup>95</sup>

Furthermore, technical regulations shall “*not be more trade-restrictive than necessary to fulfill a legitimate objective*, taking account of the risks non-fulfillment would create.” (emphasis added).<sup>96</sup> The U.S.-Chile FTA Art. 3.11 also provides that neither U.S. or Chile may adopt any prohibition or restriction on the importation of any good of the other Party except in accordance with Article XI (General Elimination of Quantitative Restrictions) of the General Agreement on Tariff and Trade 1994 (GATT).

The Proposed Rule reasons that the change to April 1 for the beginning effective date is necessary to prevent the Chilean shipments of fresh table grapes from circumventing Marketing

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<sup>94</sup> See, Annex 1 “Terms and Their Definitions for the Purpose of This Agreement” to the WTO TBT Agreement.

<sup>95</sup> WTO TBT Agreement, Art. 2.2

<sup>96</sup> *Id.*

Order 925 and the Import Regulation 4. Supposedly, the further restriction of Chilean supply will increase consumer confidence and goodwill in the commodity by limiting the amount of so-called poor quality commodity in the market.<sup>97</sup> Strictly interpreted, the WTO TBT Agreement, however, does not recognize orderly marketing or other economic goals as “legitimate objectives” of technical regulations.<sup>98</sup> National security, even in its broadest sense, cannot be read to include methods designed to enhance the profits of a small percentage of the domestic industry.<sup>99</sup> In addition, the Proposed Rule is “more trade-restrictive than necessary” because: (1) the Marketing Order 925 and Import Regulation 4 standards apply only to Chilean fresh table grapes during a period of time when there are no comparable domestic varieties available in the market; and (2) no evidence shows that the domestic industry or consumers were adversely affected by a presence in the market of so-called lower-quality Chilean fresh table grapes.

Ironically, the Proposed Rule not only advances the beginning effective date of the Import Regulation but also terminates Marketing Order 925 earlier by more than one month.<sup>100</sup> As a result, late-season Coachella and Mexican grapes will not be subject to Marketing Order 925, while the late season Chilean grapes will be subject to *increased* restrictions under the companion Import Regulation 4. This difference in treatment violates the principle of national treatment, as provided in Art III of the General Agreement on Tariffs and Trade (GATT), and Art. 2.1 of the WTO TBT Agreement. “Members shall ensure that ... products imported from

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<sup>97</sup> See, 70 Fed. Reg. at 30007-30008.

<sup>98</sup> See, Art. 2.1 of the WTO TBT Agreement (“Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health or the environment.”).

<sup>99</sup> Coachella accounts for approximately 7 percent of domestic table grape production. See, DecoFrut Analysis at 4 showing U.S. production at 840,000 tons (equivalent to approximately 103 million cases) for 2004-2005 season, and California Desert Grape Administrative Committee Annual Report 2004 at 20, showing 7.55 million cases as total production.

<sup>100</sup> See, 70 Fed. Reg. at 30002.



the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.”<sup>101</sup>

The preamble to the WTO TBT Agreement also allows Members to take “measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that *they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination* between countries where the same conditions prevail or a *disguised restriction on international trade*, and are otherwise in accordance with the provisions of this Agreement.” (emphasis added). The AMAA must be interpreted and applied, if possible, to avoid conflict with GATT codes, which conflict would violate the intent of Congress.<sup>102</sup> The Proposed Rule has not provided reasonable justification or evidence in the record for changes in the beginning and ending effective dates for Marketing Order 925 and Import Regulation 4 since such changes would constitute a “disguised restriction on international trade.”

## **2. Assessment of Inspection Fees When No Domestic Supplies Are Charged Violates GATT Articles VIII and III.**

### **(a) Assessment of inspection fees violates GATT Article VIII.**

Inspection fees charged against Chilean supplies when no domestic supplies are charged constitutes a discriminatory tax to indirectly protect domestic products in contravention of Article VIII of the GATT 1994, which is now incorporated into the WTO Agreements.

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<sup>101</sup> See also, Art. 3.2 of FTA (“Each Party shall accord national treatment to the goods of the other Party in accordance with Article III of GATT 1994”).

<sup>102</sup> See, *Fundicao Tupy S.A. v. United States*, 652 F.Supp. 1538, 1543 (Ct. Int’l Trade 1987) cited with approval in *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995); *Luigi Bormioli Corp. v. United States*, 118 F.Supp.2d 1345, 1350 (Ct. Int’l Trade 2000), *aff’d* 304 F.3d 1362 (Fed. Cir. 2002).

Article VIII:1(a) provides:

All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be *limited in amount to the approximate cost of services* rendered and shall *not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes*.

Inspection fees are charges that fall within the scope of Article VIII.<sup>103</sup> The record submissions for the Proposed Rule do not support any decline in consumer demand for table grapes or any negative effects on Coachella grape prices as a direct result of the quality or condition of Chilean grapes, and fail to provide any justification for the imposition of the new effective date for Marketing Order 925.<sup>104</sup> To the extent that the Proposed Rule imposes the USDA inspection standards on Chilean table grapes under Import Regulation 4 during the period when there is no domestic commodity available in the market, the assessment of mandatory inspection fees constitute “indirect protection [of] domestic products” within the meaning and in violation of Article VIII of GATT 1994.

Furthermore, Article VIII:1(b) and (c) create an obligation on the part of Member states to “reduc[e] the number and diversity of fees and charges referred to in sub-paragraph (a),” and to “minimize[e] the incidence and complexity of import and export formalities” and to decreas[e] and simplif[y] import and export documentation requirements.” The Proposed Rule is a movement away from the direction of Article VIII. The recent proposed increase by 15% of the inspection fees exacerbates the discriminatory imposition of those fees.<sup>105</sup>

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<sup>103</sup> See, WTO, Article VIII of GATT 1994 – Scope and Application, TN/TF/W/3, (Jan. 12, 2005), at 4.

<sup>104</sup> See *infra*, pp. 28-30.

<sup>105</sup> Revision of Fees for the Fresh Fruit and Vegetable Terminal Market Inspection Services, 70 Fed. Reg. 49882 (proposed August 25, 2005) (to be codified at 7 C.F.R. pt. 51).

**(b) Assessment of inspection fees violates Article III:2 First Sentence of GATT 1994.**

The assessment of USDA inspection fees on the Chilean imported table grapes will also constitute a discriminatory tax in contravention of Article III of GATT 1994. As the GATT Panel in *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco* noted, the question of the consistency of inspection fees with the GATT “could present itself differently under Article III in that the focus on the examination would then be on the inspection fees as internal charges and on whether or not national treatment was accorded in respect of such charges.”<sup>106</sup> The Panel implied that inspection fees fell within the scope of both Articles III and VIII of GATT 1994.

Article III:2 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party *shall not be subject*, directly or indirectly, *to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly to like domestic products*. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products *in a manner contrary to the principles set forth in paragraph 1*.

Paragraph 1 provides:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of production and internal quantitative regulations..., should not be applied to imported products *so as to afford protection to domestic production*.

(emphasis added).

A Supplementary Note to Article III further explains that:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on

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<sup>106</sup> GATT Panel Report on *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco*, Oct. 4, 1994, BISD 41S/I/131, para. 117.

the other hand, a *directly competitive or substitutable* product which was not similarly taxed.

Article III:2 therefore contains two separate standards: the standard imposed by the first sentence of the paragraph – whether products of an exporting country are taxed in excess of the taxes on the “like” domestic product; and the standard imposed by the second sentence – whether products of an exporting country are taxed similarly to domestic products which are “directly” competitive or substitutable and whether the taxation differences are applied so as to afford protection to the domestic industry.

The USDA inspection fee charged against Chilean product during the period of Marketing Order 925 and Import Regulation 4 is an “internal tax or other charge” within the scope of Article III:2. The express language of Article III:2 provides that it covers “other charges of any kind.” In addition, the GATT Panel in *United States – Tobacco* implied that inspection fees fell within the scope of “internal charges” within the meaning of Article III:2. Therefore, inspection fees should be analyzed under Article III:2 as well.<sup>107</sup>

In assessing conformity with Article III:2, WTO panels have followed the approach confirmed by the Appellate Body in *Japan – Taxes on Alcoholic Beverages*.<sup>108</sup> First, panels examine whether the taxed imported and domestic products are “like products” and, second, whether the taxes applied to the imported products are “in excess of those applied to the like domestic products.” If the imported and domestic products are “like products”, and if the taxes

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<sup>107</sup> In essence, the invalidation, by the United States District Court for the Central District of California, of Los Angeles County inspection fees assessed against Chilean fruit when no such fees were assessed against domestic production followed the national treatment principles embodied in GATT. See, *Suma Fruit Int'l USA, Inc. v. County of Los Angeles*, No. CV-90-0577 (C.D.Cal. Jan. 23, 1991). The Order is attached as Exhibit 1.

<sup>108</sup> *Japan – Taxes on Alcoholic Beverages*, Jul. 11, 1996, WT/DS8/R, WT/DS10/R and WI/DS11/R (Panel Report); Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Appellate Body Report)

applied to the imported products are “in excess of” those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

For the purposes of Article III:2, no serious argument can be made that Chilean table grapes are not “like” the same varieties that are produced in Coachella, California.<sup>109</sup> In cases in which a dispute settlement panel under the GATT or WTO has been required to determine whether products are “like,” the Panel has looked at criteria such as the product’s end-uses in a given market, consumers’ tastes and habits, the product’s properties, nature and quality, and the tariff classification of the products.<sup>110</sup> There is no question that Perlette, Flame, Thompson and Crimson varieties wherever they are produced in the world are identical, and are therefore well within the meaning of “like.”

For the purposes of Article III, *all* table grapes of any type and variety are “like”. It is not necessary that consumers consider products to be completely interchangeable to be regarded as like for the application of Article III. For example, the Panel in *Japan – Alcoholic Beverages* found that two types of distilled spirits (shochu and vodka) should be considered “like” because both were white neutral spirits, even though consumers did not consider them identical. Similarly, in the case of *Spain – Tariff on Unroasted Coffee*,<sup>111</sup> the Panel held that unwashed arabica coffee was like other types of coffee.

Any higher degree of taxation of imported products compared to like domestic products violates the first sentence of Article III:2. Panels have held that even the smallest amount of

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<sup>109</sup> As noted, *infra* pp. 10, 15, and 19, the AMAA uses a different criterion – variety as opposed to species – as the relevant point of comparison for domestic and imported table grapes.

<sup>110</sup> Appellate Body Report on *Japan – Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 20-21.

<sup>111</sup> *Spain – Tariff Treatment of Unroasted Coffee*, June 11, 1981, BISD 28S/102.

“excess” is too much.<sup>112</sup> The prohibition of discriminatory taxes in Article III:2, first sentence, therefore is not conditional on proving an effect on the trade of the imported product nor is it qualified by a *de minimis* standard.<sup>113</sup> This means that there is no need to establish that the difference in taxation has had any impact on the market in order to demonstrate a violation of the first sentence of Article III:2.

In view of the consistent precedent strictly applying the non-discrimination standard, the imposition of a marketing order with attendant mandatory inspection fees cannot survive scrutiny unless *all domestic and all imported like product are* subjected to the same charge. Proposed Marketing Order 925 and Import Regulation 4, however, cannot survive the consistency requirement for several reasons. First, as noted above, late season Chilean Thompsons are subjected to the inspections and charges whereas late season Coachella and Mexican Thompsons would be expressly exempted from the inspections and attendant charges. Second, as to domestic production, everything produced outside of Coachella is completely exempted from both the Federal inspections and the attendant charges.

Although the inspection fees charged to importers and domestic producers under Marketing Order 925 and Import Regulation 4 appear to be the same on the face of the measure, a difference in timing of collection results in differences in taxation. The inspection fee on imports is collected upon entry into the United States. By contrast, the inspection fee on domestic products is collected before the product leaves the packing area. The advantage for domestic products is substantial, since imports may suffer damage in transport that renders them

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<sup>112</sup> *Japan – Taxes on Alcoholic Beverages*, , July 11, 1996, WT/DS8/R, WT/DS10/R and WI/DS11/R (Panel Report); Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Appellate Body Report).

<sup>113</sup> *Japan – Taxes on Alcoholic Beverages* citing *United States – Measures Affecting Alcoholic and Malt Beverages*, Jun. 19, 1992, BISD 39S/274.

unable to meet more stringent shipping point grading standards upon arrival in the U.S. and therefore unsaleable; domestic products may be able to avoid the assessment for damaged grapes by diverting product to readily available processing facilities. Domestic producers also have the option of keeping table grapes in extended cold storage comparable to the two weeks of refrigerated shipment conditions that Chilean producers face, but without the necessity of meeting shipping point standards when the grapes are then sold out of cold storage.

**(c) Assessment of inspection fees violates Article III:2 Second Sentence of GATT 1994.**

Some varieties of table grapes, including a large volume of table grapes grown in California, are not subject to any federal Marketing Order or inspection fees. For WTO purposes, all table grapes are “like” Coachella table grapes. Even if the different varieties of table grapes were considered not to be sufficiently “like” for the rules of the first sentence of Article III:2, the second sentence of Article III:2 has been interpreted to forbid more than *de minimis* discrimination between “directly competitive or substitutable” products, where that discrimination operates so as to afford protection to domestic production.<sup>114</sup>

Even if different table grape varieties were assumed not to be “like”, all table grapes are “directly competitive or substitutable” within the meaning of the second sentence of Article III:2. We note the example of alcoholic beverages, where the WTO has so far found that all types of distilled spirits are directly competitive or substitutable, regardless of taste, color and quality.

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<sup>114</sup> Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Explained the possible differences in the scope of “like products” depending on provisions, stating that the concept of “likeness” is a relative one that evokes the image of an accordion stretching and squeezing in different places as different provisions of the WTO Agreement are applied, and that in Article III:2, first sentence of the GATT 1994, the accordion of “likeness” is meant to be narrowly squeezed.).

For example, in *Chile- Taxes on Alcoholic Beverages (Pisco)*,<sup>115</sup> the Panel looked at the end-uses of pisco (the Chilean distilled spirit alleged to be favorably taxed) and other distilled spirits (whisky, brandy, gin, vodka and liqueurs), their physical characteristics, the channels of distribution, and price relationships (including cross-price elasticities) and determined that Pisco and whisky, brandy, gin, vodka, and liqueurs – products which share virtually no ingredients or characteristics, other than that they contain a relatively high degree of alcohol – are directly competitive or substitutable. The Panel found that pisco and all the other distilled spirits were directly competitive or substitutable, based on the conclusions of past cases and factors such as similar (but not identical) end uses and distribution channels, shared shelf space and certain common physical characteristics. All types of table grapes are at least as similar in every salient respect as are all types of distilled spirits, i.e. end uses, distribution channels, shared shelf space and common physical characteristics.

Panels have found that it is only necessary to show that the tax burden on imported products must be heavier than on the “directly competitive or substitutable” domestic products and must be more than *de minimis*.<sup>116</sup> The inspection fee clearly exceeds the *de minimis* level as shown by the Proposed Rulemaking finding that the cost of the fee was sufficient justification for exempting smaller volume late season domestic production from the Marketing Order.

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<sup>115</sup> *Chile – Taxes on Alcoholic Beverages*, June 15, 1999, WT/DS87/R, WT/DS 11 0/R (Panel Report); *Canada – Certain Measures Concerning Periodicals*, June 30, 1997, WT/DS3 h/AB/R (Appellate Body Report).

<sup>116</sup> *Japan – Taxes on Alcoholic Beverages*, , July 11, 1996, WT/DS8/R, WT/DS10/R and WI/DS11/R (Panel Report); Oct. 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Appellate Body Report); *Chile – Taxes on Alcoholic Beverages*, June 15, 1999, WT/DS87/R, WT/DS 11 0/R (Panel Report); *Canada – Certain Measures Concerning Periodicals*, June 30, 1997, WT/DS3 1/AB/R (Appellate Body Report); *Korea – Taxes on Alcoholic Beverages*, 17 September 1998, WT/DS75/R and WT/DS84/R (Panel Report).



Furthermore, USDA has pending a proposal to increase the amount of the inspection fee.<sup>117</sup> The reduced business risk to domestic production by applying shipping point standards in the vineyard affords a huge marketing advantage. Finally, delays in getting product to market caused by the inspection process are hidden costs that substantially add to the nominal cost of the fees.

The third prong of the test to be met before a measure can be found to be incompatible with Article III:2, second sentence is that the tax differential must be applied in a manner so as to afford protection to the directly competitive or substitutable product. Dissimilar taxation is not in itself inconsistent with Article III:2, second sentence, if the effect is not to favor domestic production.

Even if the measure does not on its face discriminate on the basis of national origin, protectionist intent will be imputed, as long as the “favored product” is of a type that is exclusively or predominantly domestic. In GATT and WTO cases in which differential taxation of alcoholic beverages was at issue, Panels found discrimination inconsistent with Article III:2, where the tax system favored some domestic products to the disadvantage of other competing products. If the tax system were designed such that the advantageous tax treatment applied to beverages that were almost exclusively produced domestically, while few or no foreign products qualified for beneficial treatment, that was sufficient to find protective intent, even when the preponderance of products that were unfavorably taxed were of domestic origin.<sup>118</sup>

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<sup>117</sup> Revision of Fees for the Fresh Fruit and Vegetable Terminal Market Inspection Services, 70 Fed. Reg. 49882 (proposed August 25, 2005) (to be codified at 7 C.F.R. pt. 51).

<sup>118</sup> *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 395/274; *Chile – Taxes on Alcoholic Beverages*, adopted on 15 June 1999, WT/DS 87/R, WT/DS 110/R (Panel Report); *Japan – Taxes on Alcoholic Beverages II*, adopted 11 July 1996, WT/DS8/R, WT/DS 110/R and WT/DS 111/R (Panel Report);

The exemption of certain varieties and regions appears to favor domestic products to the disadvantage of competing products of Chile and other countries, which are subject to compulsory payment of the assessment. The rationale of the Proposed Rule strives to maintain an appearance of non-protectionism, but the Capital Trade analysis and the pronouncements of CDGAC make it quite clear that protectionism is the primary objective of the rulemaking.

**II. THE PROPOSED APRIL 1 EFFECTIVE DATE WOULD IMPOSE UNWARRANTED COSTS ON AMERICAN CONSUMERS, DOMESTIC IMPORTERS, AND OTHER RELATED INDUSTRIES WITHOUT OFFSETTING BENEFITS.**

**A. The Marketing Order, If Made Effective on April 1, Would Deny Consumers Benefits from the Availability of Chilean Grape Supplies.**

**1. The Marketing Order Would Disrupt the Continuous Supply of Table Grapes.**

The proposed change in the beginning effective date would reduce Thompson grapes supplied by Chile by approximately 2.03 million cases.<sup>119</sup> The five-year average volume of Thompson supply from week 12 (March 15) to the end of season is approximately 4.5 million cases.<sup>120</sup> Thus, the decrease in Thompson supply due to the proposed change in the effective date represents more than 45% of March-April supply. Moreover, virtually no Chilean Thompsons will be available for more than one month before the domestic crop begins to ship in June. Even if Thompsons and Perlettes are deemed substitutes for purposes of the Marketing Order, the change in date would create at least a one month gap in supply prior to mid-May when the first Coachella Perlettes begin to ship. Thus, the supply of table grapes will be greatly disrupted as a result of the proposed change. Continuous supply of table grapes is known to be

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WT/DS8/AS/R, WI/DS 10/AB/R, WT/DS/ 11/AB/R adopted on 1 November 1996 (Appellate Body Report).

<sup>119</sup> See *infra*, p. 23.

<sup>120</sup> See, DecoFruit Analyses at 14-15, attached as Exhibit 2 to ASOEX Comment in Opposition.

robustly correlated with consumer loyalty, thereby increasing repeat purchases, increased consumption and demand.<sup>121</sup> The interruption in the supply of table grapes would reduce the overall demand for table grapes, which is contrary to the purpose of marketing orders.

## **2. The Proposed Date Change Would Raise Prices for Consumers.**

The Capital Trade study shows an inverse relationship between Coachella grape prices and supply of grapes from all sources, i.e., the greater the volumes of grapes from all sources, the lower Coachella grape prices will be.<sup>122</sup> The price effect correlated to competing volume alone, however, is not a legitimate reason for marketing order restrictions, although it is clearly the primary motivation for the proposed date changes as it was for the various other non-tariff trade barriers that the Desert Grape League has pursued for the last three decades. As the Capital Trade study shows, the estimated price increase at the initial shipment points, if the proposed change in the beginning effective date were adopted, is as high as 84% for Thompsons and 61% for Crimsons, during that period when Chilean supplies are restricted by reason of the Marketing Order date change.<sup>123</sup> The likely impact of the Proposed Rule, therefore, would be: (1) to limit the supply of table grapes in the months of April and May; (2) to raise the prices of table grapes significantly; and (3) decrease consumer demand for table grapes. The Coachella growers may enjoy a short-term gain only at the expense of consumers, other growers produce retailers, and importers. But this gain is not related to an increase in consumer demand for table grapes by restricting alleged lower quality table grapes from Chile – the only legitimate mechanism to support a change in the Marketing Order date.

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<sup>121</sup> See *infra*, p. 29; California Table Grape Commission's Evaluation at 78.

<sup>122</sup> ASOEX Comment in Opposition at 11; Capital Trade Report at 9, attached as Exhibit 3 to ASOEX Comment in Opposition.

<sup>123</sup> See *infra*, p. 30; ASOEX Comment in Opposition at 16-17; Capital Trade Report at 10-11, attached as Exhibit 3 to ASOEX Comment in Opposition.

**B. The Proposed April 1 Date Would Reduce the Economic Benefits from the Availability of Chilean Fresh Table Grape Supplies.**

**1. Domestic Industries that Benefit from Chilean Fruit Supplies to the U.S. Market Will Be Negatively Affected by the Proposed Date Change.**

U.S. consumers, produce retailers and receivers of Chilean table grapes are not the only groups in the U.S. who will be negatively affected by the Proposed Rule. Chilean table grapes enter the United States mainly through Camden, New Jersey, Philadelphia, Pennsylvania and Wilmington, Delaware on the East Coast, and through Long Beach, California on the West Coast. Approximately fifty-five million (55,000,000) cases of table grapes were supplied from Chile in the 2004-2005 season.<sup>124</sup> About 76.5% of the grape shipments come through ports on the East Coast.<sup>125</sup> These grape imports generate millions of dollars in direct revenues to each port in the form of stevedoring, terminal labor, dockage and warfage, pilots and tugs, expeditors and importers, pest control, custom house brokers, motor carriers and refrigerated warehouses.<sup>126</sup> For example, the Maritime Exchange for the Delaware River and Bay, representing 280 port and related businesses from the tri-state region of Pennsylvania, New Jersey, and Delaware, projects that stevedoring companies alone contributed approximately \$31.5 million in wages and fringe benefits paid to dock workers handling Chilean table grapes.<sup>127</sup> Not to mention, state and local tax revenues are also substantial. The negative effects on the local economies of the Proposed Rule cannot be overstated.

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<sup>124</sup> DecoFrut Analyses at 12, attached as Exhibit 2 to ASOEX Comment in Opposition. *See also*, USDA AMS Market News Portal at <http://marketnews.usda.gov/portal/fv>.

<sup>125</sup> DecoFrut Analyses at 13, attached as Exhibit 2 to ASOEX Comment in Opposition.

<sup>126</sup> *See*, Comment by the Maritime Exchange for the Delaware River and Bay dated September 19, 2005; Comment by Murphy Marine Services, Inc. dated September 19, 2005; Comment by Philadelphia Regional Port Authority dated September 21, 2005; Comment by Western Industries – North, Inc. dated September 19, 2005.

<sup>127</sup> *See*, Comment by the Maritime Exchange for the Delaware River and Bay dated September 19, 2005.

### **III. ASOEX WAS NOT AFFORDED A REASONABLE OPPORTUNITY TO PARTICIPATE MEANINGFULLY IN THE RULEMAKING PROCEEDINGS.**

#### **A. Procedural History of the Rulemaking**

The Proposed Rule was published in the Federal Register on May 25, 2005. However, the data cited in the Proposed Rule was not made available at the time of publication. ASOEX made three requests to USDA: (1) a request by letter dated May 31, 2005 that USDA/AMS immediately make available all of the data cited or described in the Proposed Rule in addition to data in USDA's possession relevant to the Proposed Rule; (2) a request under the Freedom of Information Act (FOIA) dated June 3, 2005 for all of the data on which AMS/USDA relied in issuing the Proposed Rule when the USDA/AMS indicated that it would only make the information subject to the first request available if a formal FOIA request were filed; and (3) two requests for extension of the comment period, one dated June 8, 2005 and a subsequent request dated August 30, 2005 to provide sufficient time for review and analysis of the data, in the event that it was ever made available.

ASOEX contacted USDA to ascertain the status of the FOIA request on at least five separate occasions -- June 14, June 20, June 29, June 30 and July 5. Each time the agency said only that the request was under review.

On the morning of July 6, one day after the due date for a response to FOIA requests under 5 U.S.C. §552(a)(6), USDA faxed its interim response advising ASOEX of the charges for the document production and stated that some 260 pages of photocopies and a disk containing approximately 2000 pages of documents would be produced at some time in the future. On the same day, ASOEX delivered a check in the requisite amount and kindly requested that USDA expedite the production process. On July 8, USDA confirmed its receipt of the check, but did not provide any estimated date for production, stating that its General Counsel's Office must

review all the document production before the release of any part of it, even though the documents were the basis of a public rulemaking.

ASOEX continued to check periodically with the agency to determine when the document production would be ready. On July 12, 2005, ASOEX sent a letter kindly requesting a response. USDA did not respond to the letter. On July 26, 2005, USDA finally contacted ASOEX's counsel, and some but not all of the documents were released. On July 21, 2005, 4 days before the initial due date for the comment submission, ASOEX received an informal notice that the extension of the comment period until September 25, 2005 would be published on July 25, 2005.

On August 30, 2005, ASOEX appealed USDA's FOIA response, because (1) the agency failed to provide reasons for the denial and the name and the title of the person responsible for the denial contrary to its own regulatory mandates; and (2) the agency withheld certain documents even though they were clearly within the scope of FOIA request and previously identified. On August 30, 2005, ASOEX also requested another 60-day extension of the comment period so that ASOEX would have full record before commenting on the Proposed Rule.

**B. ASOEX Was Not Afforded a Meaningful Opportunity to Comment, Because AMS/USDA Failed to Provide in a Timely Manner All the Data on Which the Agency Relied in Issuing the Proposed Rule.**

Under 5 U.S.C. §553, the agency is required to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."<sup>128</sup> Courts have held that information in agency files or reports identified by the agency as relevant to the proceeding must be disclosed to the parties

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<sup>128</sup> See, 5 U.S.C. §553(c).

for adversarial comment.<sup>129</sup> Nondisclosure of key information is “not consonant with the purpose of a rule-making proceeding.”<sup>130</sup> Further, the courts have held that to know the basis upon which the rule is proposed is a prerequisite to the ability to make meaningful comment.<sup>131</sup>

AMS/USDA took more than one month before it sent out its “interim response,” and almost two months before the release of any documents. Because the agency’s decision to issue the Proposed Rule was based on various data provided to the agency by the Desert Grape League, ASOEX had to have access to the same data, and had to have adequate time to review and analyze the reports and data before submitting its comment. ASOEX has had less than 60 days to review and prepare comments on a clearly insufficient record. Moreover, ASOEX was not provided with complete records as requested. USDA withheld some information as “proprietary in nature” even though the records were cited as a basis for the Proposed Rule.<sup>132</sup> In addition, some USDA inspection-related documents identified in July 6, 2005 letter were not included in the final production. The agency cannot unreasonably delay the disclosure of information critical to its determination in proposing a new rule by burdening a prospective commenter with a formal FOIA request, failing to respond to the formal FOIA request within the statutory due date, withholding the actual document production on grounds of an internal review by the General Counsel, not fully disclosing all the information without fully providing the reasons for nondisclosure, and not timely extending the comment period.

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<sup>129</sup> See, *United States Lines, Inc. v. Fed. Maritime Comm’n*, 587 F.2d 519, 534 (D.C. Cir. 1978) citing *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393-394 (D.C. Cir. 1973).

<sup>130</sup> See, *Portland Cement Ass’n*, 486 F.2d at 393.

<sup>131</sup> See, *United States Lines, Inc.*, 587 F.2d at 534.

<sup>132</sup> See, USDA letters (re: FOIA request) dated July 6, 2005, and July 26, 2005.

## CONCLUSION

The Proposed Rule, if adopted, would constitute an arbitrary and capricious agency action, and an abuse of discretion by the agency. The rulemaking record is devoid of any evidence that: (1) during the previous year Chilean fresh grapes that did not meet the requirements of Marketing Order 925 were marketed in the U.S during the period when the Marketing Order was in effect for *available domestic table grapes*; or (2) the Chilean fresh table grapes did or was likely to circumvent the Marketing Order 925 standards. Contrary to the statutory mandate, the record does not contain any adequate consideration of the availability and price of commodities of the variety covered by the Marketing Order during any additional period the order requirements are to be in effect.

The evidence clearly shows the absence of any significant overlap between the Chilean and Coachella grape supplies. The ASOEX-commissioned study also shows that the condition of Chilean grapes has no statistically significant effect on the price of Coachella grapes. The Proposed Rule will constitute an unnecessary regulation of the market, in contravention of not only the provisions of the Agricultural Marketing Agreement Act and treaty obligations under the WTO Agreements and U.S.-Chile Free Trade Agreement, but also the agency's own administrative policy against the use of a marketing order for the purpose of controlling supply. The likely effect of the Proposed Rule would be: (1) to significantly deprive consumers of the fresh table grape supply in April, and May until sufficient domestic and Mexican supplies become available to meet demand; (2) to shift the source of supply to the U.S. market from the current ship arrivals of fresher Chilean table grapes to significantly older cold storage inventories; (3) to raise table grape prices significantly – by as high as 84% for Thompsons, and 61% for Crimsons; and (4) to diminish consumer confidence and goodwill by depriving them of



a continuous supply of fresh, mature and sweet Chilean grapes. The only beneficiaries of the Proposed Rule are Coachella growers who may enjoy a short-term gain from higher prices expected in the beginning of the domestic season due to a significant decrease in the overall supply, but only at the expense of other domestic growers, grocery store chains, importers, and the U.S. consumers. The Proposed Rule should not be adopted.

Dated, this 28 of Nov, 2005.

By: 

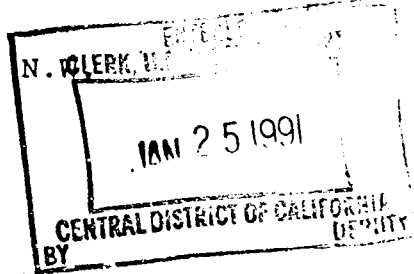
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16 Counsel for Plaintiffs



17 IN THE UNITED STATES DISTRICT COURT FOR THE  
18 CENTRAL DISTRICT OF CALIFORNIA

|   |                        |
|---|------------------------|
| 19 SUMA FRUIT INTERNATIONAL USA, INC., )    | Civil Action No.       |
| 20 <u>et al.</u> , )                        | CV-90-0577 WDK (Ex)    |
| 21 Plaintiffs, )                            |                        |
| 22 v. )                                     | [PROPOSED] PARTIAL     |
| 23 )  | SUMMARY JUDGMENT       |
| 24 )  | AGAINST DEFENDANTS     |
| 25 COUNTY OF LOS ANGELES, <u>et al.</u> , ) | Date: January 14, 1991 |
| 26 Defendants. )                            | Time: 3:00 p.m.        |
| 27 )  | Courtroom: 1600        |
| 28 )  |                        |

29 Plaintiffs' motion for summary judgment came on for hearing on  
30 January 14, 1991. Upon consideration of plaintiffs' motion for  
31 *to include but not limited to the TTs' Revised Statement of facts & law*  
32 summary judgment, defendants' opposition thereto, all papers, and  
33 proceedings, and arguments of counsel herein, it is this \_\_\_\_ day of  
34 \_\_\_\_\_, 1991, hereby

35 ORDERED that plaintiffs' motion for summary judgment is  
36 granted in part; and it is further

37 ORDERED that judgment is entered as follows:

38 The "Mandatory Inspection of Imported Produce Program for Los  
39 Angeles County" ("the Program"), as applied to table grapes imported

EXHIBIT

tabbler

1 from Chile, is hereby declared unlawful for violating Article III of  
2 the General Agreement on Tariffs and Trade ("GATT") because it  
3 discriminates by requiring mandatory inspection for a fee for all or  
4 nearly all Chilean table grapes sold in California without requiring  
5 the same treatment for all domestic table grapes;

6 The Program, as applied to table grapes imported from Chile, is  
7 hereby declared unlawful for violating the foreign commerce clause  
8 of the U.S. Constitution, art. I, § 8, cl. 3, by unduly burdening  
9 foreign commerce and interfering with the federal government's  
10 ability to "speak with one voice;"

11 The fee of 3.5 cents per container established and collected  
12 under the Program for the inspection of table grapes imported from  
13 Chile is hereby declared unlawful for violating Article III of the  
14 GATT and the foreign commerce clause;

15 The fee of 3.5 cents per container established and collected  
16 under the Program for the inspection of table grapes imported from  
17 Chile is hereby declared unlawful for violating the import-export  
18 clause of the U.S. Constitution, art. I, § 10, cl. 2, and for  
19 violating Article VIII of the GATT because the County of Los Angeles  
20 has conceded that the fees which it collected for inspecting  
21 imported produce subject to the Program exceeded the costs of the  
22 Program;

23 Enforcement of the Program as to table grapes imported from  
24 Chile is enjoined permanently;

25 Operation of the Program as to table grapes imported from Chile  
26 is enjoined permanently;

1 Defendant County of Los Angeles shall cancel, or cause to be  
2 cancelled, any outstanding statements or invoices owed by plaintiffs  
3 for the inspection under the Program of table grapes imported from  
4 Chile and plaintiffs shall be free of any further liability  
5 therefor;

6 By no later than thirty (30) days after the date of this Order,  
7 Defendant County of Los Angeles shall refund or cause to be refunded  
8 all amounts paid by plaintiffs for the inspection under the Program  
9 of table grapes imported from Chile, plus interest at the rate of  
10 ten percent (10%) per annum accruing from the date of payment of the  
11 inspection fees by plaintiffs through the date of payment of the  
12 judgment by defendant.

13 WILLIAM D. KELLER

14 JAN 23 1991

15 KELLER, J.  
16 UNITED STATES DISTRICT COURT  
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OFFICE OF THE UNITED STATES  
TRADE REPRESENTATIVE  
EXECUTIVE OFFICE OF THE PRESIDENT  
WASHINGTON  
20505

DEC 28 1969

Mr. E. Leon Spaugy  
Agriculture Commissioner  
Director of Weights and Measures  
County of Los Angeles  
3400 La Medera Avenue  
El Monte, California 91732

Dear Mr. Spaugy:

I am writing with regard to implementation of Section 42685 of the California Food and Agriculture Code. I understand that under this authority inspection fees are being charged on certain imported fruits, vegetables and nuts entering the County of Los Angeles.

Since the United States is a party to the General Agreement on Tariffs and Trade (GATT), the Administration is responsible for ensuring adherence to GATT rules on international trade. The Administration has received a formal demarche from the Government of Chile expressing its concern that the level of fees imposed on certain imported fruits or vegetables by your office under the Section 42685 authority might be inconsistent with Article VIII of the GATT. Under Article VIII of the GATT, a copy of which I have enclosed for your consideration, import fees like those being imposed under Section 42685 must be approximately equivalent to the cost of services rendered to the importer and cannot serve as a disguised form of taxation. If the fees are not being implemented in a GATT-consistent manner, U.S. exports, including agricultural products from California, might be subject to GATT-sanctioned retaliation by foreign governments.

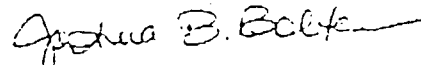
For this reason, we would appreciate an explanation of the reasons for conducting the inspections, the relation the fees have to the cost of inspection, and how this cost has been calculated. We would appreciate your informing us of the basis for concluding that there are "extraordinary circumstances" which have necessitated the inspections, a conclusion required by Section 42685 prior to conducting the inspections, and whether a public hearing has been held on the matter. In addition, please provide information on the level of fees charged on like agricultural products produced in California, on like products grown in and entering from other U.S. states, and on like

Mr. E. Leon Spaugy  
page Two

imported goods entering California from foreign countries,  
including Canada, Mexico, and Chile.

Thank you in advance for your assistance. If you or your staff  
have any questions about our request for information, please feel  
free to call me or Ellen Terpstra (Advisor to Assistant U.S.  
Trade Representative) at (202) 395-5006.

Sincerely,

  
Joshua B. Bolten  
General Counsel

Enclosure

JB:tlh





UNITED STATES INTERNATIONAL TRADE COMMISSION

SPRING TABLE GRAPES FROM CHILE AND MEXICO  
Investigations Nos. 731-TA-926 and 927 (Preliminary)

DETERMINATIONS AND VIEWS OF THE COMMISSION  
(USITC Publication No. 3432, June 2001)



**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Investigations Nos. 731-TA-926 and 927 (Preliminary)**

**SPRING TABLE GRAPES FROM CHILE AND MEXICO**

**DETERMINATIONS**

On the basis of the record<sup>1</sup> developed in the subject investigations, the United States International Trade Commission (Commission) determines,<sup>2</sup> pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) (the Act), that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded, by reason of imports from Chile and Mexico of spring table grapes, provided for in subheading 0806.10.40 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

**BACKGROUND**

On March 30, 2001, a petition was filed with the Commission and the United States Department of Commerce (Commerce) by the Desert Grape Growers League, Thermal, CA, and its producer-members, alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of spring table grapes from Chile and Mexico. Accordingly, effective March 30, 2001, the Commission instituted antidumping duty investigations Nos. 731-TA-926 and 927 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of April 5, 2001 (66 FR 18109). The conference was held in Washington, DC, on April 20, 2001, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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<sup>1</sup> The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

<sup>2</sup> Commissioner Dennis M. Devaney dissenting with respect to imports of spring table grapes from Chile and Mexico.

## **VIEWS OF THE COMMISSION**

### **Investigations Nos. 731-TA-926 and 927 (Preliminary)**

#### **SPRING TABLE GRAPES FROM CHILE AND MEXICO**

Based on the record in these investigations, we find that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of table grapes from Chile or Mexico that are allegedly sold in the United States at less than fair value ("LTFV").<sup>3</sup>

#### **I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS**

The legal standard in a preliminary antidumping investigation requires the Commission to find, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured or is threatened with material injury, or that the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.<sup>4</sup> In applying this standard, the Commission weighs the evidence before it and determines whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."<sup>5</sup>

#### **II. DOMESTIC LIKE PRODUCT AND INDUSTRY**

##### **A. In General**

In determining whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "domestic like product" and the "industry."<sup>6</sup> Section 771(4)(A) of the Tariff Act of 1930, as amended ("the Act"), defines the relevant domestic industry as the "producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."<sup>7</sup> In turn, the Act defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . ."<sup>8</sup>

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<sup>3</sup> Commissioner Dennis M. Devaney dissenting. See Commissioner Devaney's Dissenting Views.

<sup>4</sup> 19 U.S.C. § 1673b(a). See also *American Lamb Co. v. United States*, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); *Aristech Chemical Corp. v. United States*, 20 CIT 353, 354 (1996).

<sup>5</sup> *American Lamb*, 785 F.2d at 1001 (Fed. Cir. 1986). See also *Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

<sup>6</sup> 19 U.S.C. § 1677(4)(A).

<sup>7</sup> *Id.*

<sup>8</sup> 19 U.S.C. § 1677(10).

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis, generally through the application of a six-factor test.<sup>9</sup> No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a particular investigation.<sup>10</sup> The Commission looks for clear dividing lines among possible like products and disregards minor variations.<sup>11</sup> Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise allegedly subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.<sup>12</sup>

## B. Product Description

Commerce has defined the scope of the subject merchandise in these investigations as follows: imports of any variety of *vitis vinifera* species table grapes from Chile or Mexico, entered during the period April 1 through June 30, inclusive, regardless of grade, size, maturity, horticulture method (i.e., organic or not) or the size of the container in which packed. The scope specifically covers all varieties of seedless or seeded grapes including, but not limited to, Thompson, Red Flame, Red Globe, Perlettes, Superior seedless, Sugrone, Ribier, Black seedless, Red seedless, Blanca Italia, Moscatel Rosada, Crimson seedless, Lavallee, Emperor, Queen Rose, Calmeria, Christmas Rose, Down seedless, Beauty seedless, Almeria, Supreme seedless, Superior Seedless M., Late Royal, Muscat seedless, Royal seedless, Early Ribier, Cardinal, Moscatel Dorada, Black Giant, Kaiji, Lady Rose, Black Diamond, Piruviano, Early Thompson, King Ruby seedless, White seedless, Queen seedless, Autumn seedless, Royal, Pink seedless, Green Globe, Autumn Black, Black Beauty, and Royal Giant. The scope specifically covers all table grapes entered within the

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<sup>9</sup> See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int’l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int’l Trade 1990), aff’d, 938 F.2d 1278 (Fed. Cir. 1991) (“every like product determination ‘must be made on the particular record at issue’ and the ‘unique facts of each case’”). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455 n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int’l Trade 1996).

<sup>10</sup> See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

<sup>11</sup> Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249 at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in “such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not ‘like’ each other, nor should the definition of ‘like product’ be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.”).

<sup>12</sup> Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

April 1 through June 30 window of each year, whether or not subject to the Federal Marketing Order set forth in 7 CFR, part 925.<sup>13</sup>

The subject merchandise consists of all grapes imported from Chile and Mexico during April, May, and June that are intended for consumption in raw form as grapes. The term “table grapes” is used to distinguish these grapes from grapes that are grown for processing into products such as raisins or wine.

### **C. Domestic Like Product**

#### **1. Spring Table Grapes Versus All Table Grapes**

The petitioners, the Desert Grape Growers League and its members,<sup>14</sup> argue that the Commission should define the domestic like product to be only table grapes produced during April, May, or June (“Spring” table grapes).<sup>15</sup> According to petitioners, the “most important factors the Commission must consider are not among the six traditional factors, but are the seasonal nature of domestic Spring table grape production and the perishability of the product.”<sup>16</sup> Petitioners claim that Spring table grapes and table grapes grown later in the year<sup>17</sup> differ in that they do not overlap in the market and only Spring table grapes are marketed coincidentally with the subject imports.<sup>18</sup> They state that the Commission’s consideration of its traditional six factors should be strongly influenced by the seasonal nature of the product and its perishability. Petitioners argue that such an analysis supports defining the like product to be Spring table grapes rather than all table grapes.<sup>19</sup>

The Chilean and Mexican Respondents<sup>20</sup> argue that defining the domestic like product to be table grapes produced in April, May, and June would be contrary to the statutory definition of the domestic like

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<sup>13</sup> The description of the scope of investigation also stated:

For further discussion, see the May 9, 2001, memorandum from the case team to Richard Moreland and Joseph Spetrini entitled “Temporal Limitations on the Class or Kind Described in the Antidumping Duty Petitions on Spring Table Grapes from Mexico and Chile.” The scope excludes by-product grapes and other grapes for use as other than table grapes, including those grapes used for raisins, crushing, juice, wine, canning, processed foods and other by-product and not direct consumption purposes. The spring table grapes subject to these investigations are classifiable under subheading 0806.10.40 of the Harmonized Tariff Schedule of the United States (HTS). Although the HTS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

66 Fed. Reg. 26831, 26832 (May 15, 2001).

<sup>14</sup> Petition of March 30, 2001 at 1.

<sup>15</sup> Petitioners’ Postconference Brief, Exh. 1 at 29.

<sup>16</sup> Petitioners’ Postconference Brief, Exh. 1 at 30.

<sup>17</sup> Most domestic table grapes are produced later in the year, north of the Coachella Valley in the Central Valley of California, the Kern District and San Joaquin Valley. See Petitioners’ Postconference Brief, Exh.22.

<sup>18</sup> 19 U.S.C. § 1673b(a). See also *American Lamb Co. v. United States*, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); *Aristech Chemical Corp. v. United States*, 20 CIT 353, 354 (1996).

<sup>19</sup> Petitioners’ Postconference Brief, Exh. 1 at 46-62.

<sup>20</sup> The Chilean Respondents are the Asociacion de Exportadores de Chile, an association of exporters of Chilean grapes. The Mexican Respondents are the Asociacion Agricola Local de Productores de Uva de Mesa, A.C., an association of Mexican producers of table grapes.

product and Commission practice. They argue that the timing of production and sale is not a basis for distinguishing between products for purposes of defining the domestic like product. Furthermore, they maintain that there are no significant differences between Spring table grapes and table grapes grown later in the year, particularly with respect to the six factors traditionally considered by the Commission.<sup>21</sup>

We have considered whether the statute permits us to consider seasonality as the main factor in our determination of domestic like product. We find that it does not. The statute requires the Commission to identify the product which is “like” the article subject to investigation.<sup>22</sup> While seasonality and perishability may be *among* the factors we consider, they do not override the other factors that the Commission must examine to establish whether the domestic product is “like” subject imports.

The record does not indicate any significant differences between the table grapes produced during April, May, and June and those produced later in the year. The only apparent difference between these grapes is the timing of the harvest. The table grape harvest in the Coachella Valley generally begins in May and ends in July, while the harvest in the San Joaquin Valley begins in June or July and ends early in the following year.<sup>23</sup> However, as discussed below, other significant similarities between the products far outweigh this temporal distinction.<sup>24</sup>

The physical characteristics and end uses of table grapes produced during April, May, and June and of those produced later in the year are essentially identical.<sup>25</sup> The similarities in product characteristics make table grapes produced in the Spring interchangeable with those grown later in the year. Petitioners

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<sup>21</sup> Mexican Respondents’ Postconference Brief at 24-30; Chilean Respondents’ Postconference Brief at 7-35.

<sup>22</sup> 19 U.S.C. § 1677(10).

<sup>23</sup> See Mexican Respondents’ Postconference Brief, App. 5 (collecting time of harvest data from the USDA and Chuck Allen’s Market Review).

<sup>24</sup> Moreover, there is some, albeit attenuated, overlap in production and availability of Spring table grapes and the table grapes harvested later in the year, which necessarily varies from harvest to harvest due to variability in growing and harvesting conditions. Table grapes produced in the Coachella Valley and Arizona at the end of June and early July compete to some degree with San Joaquin Valley and Kern District table grapes, which are harvested beginning at the end of June or early July. See Petitioners’ Postconference Brief, Exh. 22 and Mexican Respondents’ Postconference Brief, App. 5. Coachella Valley producers were shipping grapes in July two of the last three years. See Petitioners’ Postconference Brief, Exh. 22. Further, Arizona growers, who petitioners characterize as producing Spring table grapes, produced a significant quantity of their table grapes in July in two of the last three years. *Id.* Like all table grapes, Spring table grapes can remain in storage and be present in the market for up to four to six weeks after they are produced. Tr. at 34. Thus, Spring table grapes and table grapes grown later in the year overlap to some degree in time of production and in the marketplace.

<sup>25</sup> See Tr. at 17-19; Confidential Staff Report, June 1, 2001 (“CR”) at I-7 to I-8, Public Staff Report (“PR”) at I-5. Petitioners claim that Spring table grapes have a shorter shelf life because they are grown at hotter temperatures and are subject to a federal marketing order. The federal marketing order regulates the quality of table grapes through inspections, but it is a minimal standard. Tr. at 25, 177-78. It also does not apply to grapes grown in Arizona. Therefore, not all Spring table grapes, as petitioner defines them, are subject to the marketing order. CR at I-4, PR at I-3. The record also indicates that growing temperatures in the San Joaquin Valley, where later-harvested grapes are grown, are quite hot at harvest time, suggesting that harvest temperatures do not differ significantly. Tr. at 87-88; Mexican Respondents’ Postconference Brief at App. 7. Regardless of the merit of petitioners’ claims, table grapes produced at other times in California are the same species and are used by consumers in the same manner. Petitioners’ assertions only suggest some degree of quality differences, which would not establish that table grapes grown at other times are not part of the same domestic like product.

assert that there is no actual interchangeability because table grapes produced in later months are not present in the market at the same time with Spring table grapes. As discussed above, the statute implicitly permits seasonality to be *among* the factors considered. It does not permit seasonality to override the substantial similarities between “Spring” and all other table grapes. Moreover, as already discussed, there is some overlap in harvest times, although we acknowledge that actual interchangeability is limited to the extent that producers of Spring table grapes try to avoid competing with the later-season table grapes grown in larger quantities further north in California.<sup>26</sup>

Channels of distribution, manufacturing processes, and price are similar, if not identical, for Spring table grapes and table grapes grown later in the year. All table grapes move through similar channels of distribution.<sup>27</sup> The production processes for Spring table grapes and table grapes grown later in the year are essentially the same and some employees work on grape harvests in both the Coachella and San Joaquin Valleys.<sup>28</sup> There is no evidence that purchasers or producers perceive Spring table grapes to be significantly different from table grapes grown later in the year.<sup>29</sup> Prices for table grapes grown later in the year may be a bit lower, but this may reflect the much greater supply of table grapes during the Summer months.<sup>30</sup>

Each Commission investigation is *sui generis* and based on a unique interaction of economic variables. Nonetheless, petitioners assert that the Commission’s 1983 decision in Fall-Harvested Round White Potatoes from Canada provides precedent for a finding a seasonal like product.<sup>31</sup> While the Commission in that investigation defined the like product as round white potatoes harvested in the Fall, the Fall-harvested potatoes differed significantly in physical characteristics from those harvested at other times and the Commission’s decision was based on those differences and not on seasonality alone.<sup>32</sup> Moreover, the Fall-harvested potatoes were in the market most of the year because they could be stored for long periods.<sup>33</sup>

In conclusion, the statute does not permit seasonality to override other factors used to determine the domestic like product. In these investigations, we find a high level of similarity between “Spring” and other table grapes and a lack of any significant differences besides time of harvest. We therefore find the domestic like product to be all table grapes.

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<sup>26</sup> Tr. at 101-102.

<sup>27</sup> CR at I-10 to I-11, PR at I-7.

<sup>28</sup> CR at I-9, PR at I-6. Petitioners have identified cultivation techniques for Spring table grapes that they assert are not used for table grapes grown at other times. However, these additional steps (application of a chemical to bring the vines out of dormancy and sprinkling the vines with water) are outweighed by the significant similarities in the overall production process. See Tr. at 23-24. See also Tr. at 53 (production processes same for San Joaquin Valley and Coachella Valley table grapes).

<sup>29</sup> See CR at I-9, PR at I-6; Tr. at 17-18.

<sup>30</sup> See Petitioners’ Postconference Brief, Exh.1 at 1 and Exh. 22.

<sup>31</sup> Inv. No. 731-TA-124 (Final) USITC Pub. 1463 (Dec. 1983).

<sup>32</sup> USITC Pub. 1463 at 6.

<sup>33</sup> See USITC Pub. 1463 at Table 18.

## **2. Seeded Table Grapes**

The Chilean Respondents ask the Commission to define seedless and seeded table grapes as distinct domestic like products.<sup>34</sup> They note that seeded and seedless table grapes differ in physical characteristics in that only seeded table grapes have seeds and they argue that seeded and seedless table grapes are not interchangeable because only seedless table grapes can be used in salads and other foods.<sup>35</sup>

Petitioners maintain that seeded and seedless table grapes should not be separate like products because seeds are only a minor physical characteristic of the grape and seedless and seeded grapes are produced, marketed, and sold side by side.<sup>36</sup>

The presence or absence of a seed does not alter the fundamental physical characteristics or uses of table grapes. Seeds may limit interchangeability for certain uses, such as in salads, but both varieties travel through the same channels of distribution.<sup>37</sup> Seeded and seedless varieties are grown in the same manner.<sup>38</sup> There is some evidence that purchasers and producers perceive them to be different products and that some consumers prefer one or the other type.<sup>39</sup> Prices for seeded and seedless table grapes are similar.<sup>40</sup> Based on similarities in physical characteristics, end uses, production, channels of distribution and pricing, we conclude that the similarities between seeded and seedless table grapes outweigh any differences between these two types of table grapes.

### **D. Domestic Industry and Related Parties**

In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.<sup>41</sup> Based upon our domestic like product definition, we define the domestic industry as all domestic producers of table grapes.

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to section 771(4)(B) of the Act. That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic industry producers that are related to an exporter or importer of subject merchandise or which are themselves importers.<sup>42</sup>

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<sup>34</sup> Chilean Respondents' Postconference Brief, Attachment 1 at 1.

<sup>35</sup> Chilean Respondents' Postconference Brief, Attachment 1 at 1-2.

<sup>36</sup> See Petitioners' Postconference Brief, Exh. 1 at 74-76

<sup>37</sup> CR at I-10, PR at I-7.

<sup>38</sup> Tr. at 68 (Bianco).

<sup>39</sup> Tr. 147, 161.

<sup>40</sup> See CR & PR at Figs. V-3, V-4 and V-5.

<sup>41</sup> See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (CIT 1994), aff'd, 96 F.3d 1352 (Fed. Cir.1996).

<sup>42</sup> 19 U.S.C. § 1677(4)(B).



Exclusion of such a producer is within the Commission's discretion based upon the facts presented in each case.<sup>43</sup>

\*\*\*, a domestic producer of table grapes, imported the subject merchandise during the period of investigation.<sup>44</sup> Therefore, it is a related party and may be excluded from the definition of the domestic industry if appropriate circumstances exist.

\*\*\* imported \*\*\* million pounds of subject imports from Mexico in 1999, \*\*\* million pounds in 2000, and has arranged for the importation of \*\*\* million pounds in 2001.<sup>45</sup> However, its production of table grapes was far greater, \*\*\* million pounds in 2000.<sup>46</sup> Given that it is primarily a domestic producer of table grapes, we decline to exclude \*\*\* from the domestic industry and therefore define the domestic industry as all producers of table grapes.<sup>47</sup>

### III. CUMULATION

#### A. In General

For purposes of evaluating the volume and price effects for a determination of reasonable indication of material injury by reason of the subject imports, section 771(7)(G)(i) of the Act requires the Commission to assess cumulatively the volume and effect of imports of the subject merchandise from all countries as to which petitions were filed and/or investigations self-initiated by Commerce on the same day, if such imports compete with each other and with domestic like products in the U.S. market.<sup>48</sup> In assessing

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<sup>43</sup> *Sandvik AB v. United States*, 721 F. Supp. 1322, 1331-32 (Ct. Int'l Trade 1989), *aff'd without opinion*, 904 F.2d 46 (Fed. Cir. 1990); *Empire Plow Co. v. United States*, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude the related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation, *i.e.*, whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and (3) the position of the related producers vis-a-vis the rest of the industry, *i.e.*, whether inclusion or exclusion of the related party will skew the data for the rest of the industry. *See, e.g.*, *Torrington Co. v. United States*, 790 F. Supp. 1161, 1168 (Ct. Int'l Trade 1992), *aff'd without opinion*, 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to U.S. production for related producers and whether the primary interests of the related producers lie in domestic production or in importation. *See, e.g.*, *Melamine Institutional Dinnerware from China, Indonesia, and Taiwan*, Inv. Nos. 731-TA-741-743 (Final), USITC Pub. 3016 at 14, n.81 (Feb. 1997).

<sup>44</sup> *See* CR & PR at Table IV-5.

<sup>45</sup> CR & PR at Table IV-5.

<sup>46</sup> Letter from \*\*\* to Department of Commerce, April 26, 2001, *in* Mexican Respondents' Postconference Brief, Exh.17.

<sup>47</sup> Petitioners have asserted that some Central Valley producers of table grapes are also importers of the subject merchandise. Petitioners' Postconference Brief, Exh. 1 at 3-4. However, petitioners have not argued that we should exclude these producers under the related parties provision and no evidence on the record indicates that appropriate circumstances exist to do so.

<sup>48</sup> 19 U.S.C. § 1677(7)(G)(i).

whether subject imports compete with each other and with the domestic like product,<sup>49</sup> the Commission has generally considered four factors, including:

- (1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
- (2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;
- (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and
- (4) whether the subject imports are simultaneously present in the market.<sup>50</sup>

While no single factor is necessarily determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the subject imports compete with each other and with the domestic like product.<sup>51</sup> Only a “reasonable overlap” of competition is required.<sup>52</sup>

## B. Analysis

Fungibility among the subject imports and the domestic like product is high,<sup>53</sup> as the same varieties of grapes of comparable quality are generally grown in the United States and in Mexico and Chile.<sup>54</sup> Subject imports from both countries and domestically-produced table grapes are sold or offered for sale in the same geographic market, the entire United States,<sup>55</sup> and the channels of distribution are similar for the subject imports and domestic table grapes.<sup>56</sup>

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<sup>49</sup> The SAA expressly states that “the new section will not affect current Commission practice under which the statutory requirement is satisfied if there is a reasonable overlap of competition.” SAA at 848, citing Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898, 902 (Ct. Int’l Trade 1988), aff’d, 859 F.2d 915 (Fed. Cir. 1988).

<sup>50</sup> See Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278-280 (Final), USITC Pub. 1845 (May 1986), aff’d, Fundicao Tupy, S.A. v. United States, 678 F. Supp. 898 (Ct. Int’l Trade), aff’d, 859 F.2d 915 (Fed. Cir. 1988).

<sup>51</sup> See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50 (Ct. Int’l Trade 1989).

<sup>52</sup> See Goss Graphic System, Inc. v. United States, 33 F. Supp. 2d 1082, 1087 (Ct. Int’l Trade 1998) (“cumulation does not require two products to be highly fungible”); Mukand Ltd. v. United States, 937 F. Supp. 910, 916 (Ct. Int’l Trade 1996); Wieland Werke, 718 F. Supp. at 52 (“Completely overlapping markets are not required.”).

<sup>53</sup> See Tr. at 17-18.

<sup>54</sup> CR at I-9 to I-10, PR at I-6; Tr. at 105.

<sup>55</sup> See Petitioners’ Postconference Brief, Exh. 2 (compiling importers’ questionnaire responses that generally indicated that the market was the entire United States).

<sup>56</sup> CR at I-10, PR at I-7.

Subject imports from Chile, however, are not to any significant degree simultaneously present in the market with subject imports from Mexico or the domestic like product.<sup>57</sup> The great majority of the Chilean subject imports are “packed out” and shipped to the United States by the end of April.<sup>58</sup> Since table grapes are highly perishable, they are generally no longer saleable 4-6 weeks after harvest.<sup>59</sup> Therefore, Chilean subject imports are essentially no longer competing in the U.S. market by early June and have relatively little overlap with subject imports from Mexico and the domestic like product.<sup>60</sup> This is confirmed by shipment data from U.S. importers and domestic producers which show minimal overlap in shipments between the subject imports from Chile and domestic table grapes as well as the subject imports from Mexico.<sup>61</sup> Moreover, examining the period of investigation as a whole (36 months), there are only 3 months with coincidence of significant shipments of subject imports from both Chile and Mexico and the domestic like product.<sup>62</sup>

We therefore find that a reasonable overlap of competition does not exist between the subject imports from Chile and Mexico. Nor do we find a reasonable overlap of competition between subject imports from Chile and the domestic like product. Consequently, we do not cumulate subject imports for the purpose of analyzing whether there is a reasonable indication that the domestic industry is materially injured or threatened with material injury by reason of the subject imports.<sup>63</sup>

#### **IV. MATERIAL INJURY OR THREAT OF MATERIAL INJURY BY REASON OF SUBJECT IMPORTS**

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<sup>57</sup> We note that the SAA approves of a temporal analysis for purposes of cumulation but not for like product. See SAA at 848, citing *Fundicao Tupy, S.A. v. United States*, 678 F. Supp. 898, 902 (Ct. Int’l Trade 1988), *aff’d*, 859 F.2d 915 (Fed. Cir. 1988).

<sup>58</sup> CR & PR at Figs. IV-3, IV-4, IV-5. The subject imports from Chile generally arrive in the United States about two weeks later. Chilean Respondents’ Postconference Brief at 7.

<sup>59</sup> Table grapes can be stored in refrigeration for up to 4-6 weeks. Tr. at 34.

<sup>60</sup> Petitioners claim that Chilean grapes are kept in cold storage for up to 90 days so that they can compete in the U.S. market into May and June. Petitioners’ Postconference Brief at 12 (citing Tr. at 19); Tr. at 52. The Chileans maintain that they do not store grapes for the long periods asserted by petitioners. Tr. at 135 (Mr. Bown); Tr. at 143; Tr. at 143 (Mr. Eastes). The record does not support a finding that subject product from Chile is present in the U.S. market in significant quantities past early June.

Table grapes harvested late in the season have shorter shelf lives and tend to sell for a lower price. CR at V-4, PR at V-3. Hence, there is a strong incentive to sell grapes when they are fresh and command a price premium and also to avoid competition with fresher grapes that arrive on the market later. CR at I-10, PR at I-6. See also Tr. at 106; Petitioners’ Postconference Brief, Exh.1 at 38. The marketing order’s April 20 start date provides an additional incentive to import table grapes from Chile before that date. See Chileans’ Postconference Brief, Exh 15 (showing that over 90 percent of Chilean imports are before the April 20 start of the marketing order which provides for USDA inspection of the imports).

<sup>61</sup> See CR & PR at Tables V-1 and V-2 (domestic and Mexican grapes not competing until May and small quantities of Chilean imports reported in May, except in 2000); CR & PR at Table V-3 (Chilean subject imports competing in May but limited subject imports from Mexico and limited domestic grapes).

<sup>62</sup> INV-Y-117, June 8, 2001, at 1-4. Importers shipped only very small quantities of subject imports from Chile during May in 1998, 1999, and 2000.

<sup>63</sup> As the CIT has held, “[a] finding by the ITC of a like product does not control whether the ITC finds competition between the subject imports for the purpose of cumulation.” *Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT \_\_\_, 74 F. Supp.2d 1353, 1371 (1999).

### A. Legal Standard - Material Injury

In the preliminary phase of antidumping or countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is materially injured by reason of the imports under investigation.<sup>64</sup> In making this determination, the Commission must consider the volume of subject imports, their effect on prices for the domestic like product, and their impact on domestic producers of the domestic like product, but only in the context of U.S. production operations.<sup>65</sup> The statute defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."<sup>66</sup> In assessing whether there is a reasonable indication that the domestic industry is materially injured by reason of subject imports, we consider all relevant economic factors that bear on the state of the industry in the United States.<sup>67</sup> No single factor is dispositive, and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."<sup>68</sup>

With respect to the volume of the subject imports, section 771(7)(C)(i) of the Act provides that the "Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."<sup>69</sup>

With respect to the price effects of the subject imports, section 771(7)(C)(ii) of the Act provides that, in evaluating the price effects of the subject imports, the Commission shall consider whether –

- (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
- (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.<sup>70</sup>

In examining the impact of the subject imports on the domestic industry, we consider all relevant economic factors that bear on the state of the industry in the United States.<sup>71</sup> These factors include

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<sup>64</sup> 19 U.S.C. §§ 1671b(a) and 1673b(a).

<sup>65</sup> 19 U.S.C. § 1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination" but shall "identify each [such] factor . . . [a]nd explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B). See also Angus Chemical Co. v. United States, 140 F.3d 1478 (Fed. Cir. 1998).

<sup>66</sup> 19 U.S.C. § 1677(7)(A).

<sup>67</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>68</sup> 19 U.S.C. § 1677(7)(C)(iii).

<sup>69</sup> 19 U.S.C. § 1677(7)(C)(i).

<sup>70</sup> 19 U.S.C. § 1677(7)(C)(ii).

<sup>71</sup> 19 U.S.C. § 1677(7)(C)(iii). See also SAA at 851, 885 ("In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is

(continued...)

output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”<sup>72 73 74</sup>

Petitioners have brought this case on the basis of injury to a “Spring” table grapes industry. However, as discussed, the statute does not permit the Commission to define such an industry on the facts of this case, and we are therefore required by statute to consider whether the entire domestic table grapes industry has been materially injured or is threatened with material injury by reason of subject imports.

## **B. Legal Standard - Threat of Material Injury**

In the preliminary phase of antidumping or countervailing duty investigations, the Commission determines whether there is a reasonable indication that an industry in the United States is threatened with material injury by reason of the imports under investigation.<sup>75</sup>

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted.”<sup>76</sup> The Commission may not make such a determination “on the basis of mere conjecture or supposition,” and considers the threat factors “as a whole” in making its determination whether dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued.<sup>77</sup> In making our determination, we have considered all statutory factors that are relevant to these investigations,<sup>78</sup> including the rate of the

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<sup>71</sup> (...continued)

facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports.” *Id.* at 885.).

<sup>72</sup> 19 U.S.C. § 1677(7)(C)(iii). *See also* SAA at 851, 885; *Live Cattle from Canada and Mexico*, Inv. Nos. 701-TA-386, 731-TA-812-813 (Preliminary), USITC Pub. 3155 (Feb. 1999) at 25 n.148.

<sup>73</sup> The statute instructs the Commission to consider the “magnitude of the dumping margin” in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii) (V). In its notice of initiation, Commerce identified estimated dumping margins of 23.00 to 99.39 percent for subject imports from Chile and dumping margins of 0.00 to 114.77 percent for subject imports from Mexico. 66 Fed. Reg. 26831 (May 15, 2001). There are no known dumping findings involving the subject merchandise in any other markets. CR & PR at VII-1 n.2

<sup>74</sup> Commissioner Bragg notes that she does not ordinarily consider the margin of dumping to be of particular significance in evaluating the effects of subject imports on domestic producers. *See Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China*, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

<sup>75</sup> 19 U.S.C. §§ 1671b(a) and 1673b(a).

<sup>76</sup> 19 U.S.C. § 1673d(b) and 1677(7)(F)(ii).

<sup>77</sup> 19 U.S.C. § 1677(7)(F)(ii).

<sup>78</sup> 19 U.S.C. § 1677(7)(F)(i). Factor VI regarding product-shifting is not an issue in these investigations. Factor VII also is inapplicable because these investigations do not involve imports of a processed agricultural product.

increase in the volume and market penetration of subject imports, unused production capacity, and inventories of subject merchandise.

### C. Conditions of Competition

The following conditions of competition are pertinent to our analysis of material injury and threat of material injury by reason of subject imports from Chile and Mexico.

U.S. apparent consumption of table grapes increased over the period of investigation.<sup>79</sup> To meet this growing demand, acreage dedicated to production in the United States has increased as have U.S. producers' shipments.<sup>80</sup> The total value of domestic producers' shipments has also increased.<sup>81</sup>

The production or harvesting of table grapes in the United States occurs from April through December, depending on the area where they are grown.<sup>82</sup> The vast majority of U.S. production of table grapes occurs in months other than April, May, and June.<sup>83</sup> There is a substantial volume of nonsubject imports, including imports from Chile and Mexico, during periods other than April-June.<sup>84</sup>

Grapes harvested in the Coachella Valley and grapes imported between April 20 and August 15 are subject to a federal marketing order.<sup>85</sup> The order provides for USDA inspections of table grapes from the Coachella Valley and imports so that consistent quality is maintained.<sup>86</sup>

Purchasers generally buy table grapes on the spot market.<sup>87</sup> Prices for table grapes are generally high early in May-June and July-August when grapes are fresh and supply is limited; as the season

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<sup>79</sup> Apparent consumption was 1.99 billion pounds in 1998, 2.15 billion pounds in 1999, and 2.32 billion pounds in 2000. CR & PR at Table IV-9.

<sup>80</sup> CR & PR at Table IV-9; Mexican Respondents' Postconference Brief, App. 8 (data from USDA NASS Noncitrus Fruits and Nuts 2000 Preliminary Summary, CASS Agricultural Overview 1998-99); Chilean Respondents' Postconference Brief, Exh. 11 (data from ODEPA and USDA, National Agricultural Statistics Service).

<sup>81</sup> Mexican Respondents' Postconference Brief, App. 8; California Table Grapes Commission Situation Analysis 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26). While the data in the Situation Analysis reflects only California table grapes, California is the source of 99 percent of U.S. production. See CR at III-9, PR at III-8; CR & PR at Table III-8.

<sup>82</sup> Mexican Respondents' Postconference Brief, App. 5. In any growing season, the Coachella Valley growers, which account for less than 15 percent of U.S. production, generally harvest first. The Arizona growers typically harvest next, and the central and northern California growers are the last to harvest. See *Id.*

<sup>83</sup> See CR & PR at Table III-8. Production during the three months ranged from 11.4 percent to 13.6 percent of total domestic production from 1998 to 2000. *Id.*

<sup>84</sup> Compare CR & PR at Table IV-7 with CR & PR at Table IV-6. Nonsubject imports from Chile are over five times the amount of subject imports from Chile. See CR & PR at Table IV-7.

<sup>85</sup> The marketing order, 7 C.F.R. 925, regulates the quality of imports and domestic grapes from the Coachella Valley from April 20 to August 15. See CR at I-4, PR at I-5. Because there is an incentive to ship immature grapes when prices are high early in the season, the marketing order's purpose is to ensure consistent table grape quality through inspection, thus avoiding customer dissatisfaction. 52 Fed. Reg. 8865 (Mar. 10, 1987) (contained in Chilean Respondents' Postconference Brief, Exh. 14).

<sup>86</sup> See Tr. at 13.

<sup>87</sup> CR at V-4, PR at V-3; Tr. at 18-19.

progresses, prices and quality generally decline.<sup>88</sup> When volumes of table grapes in the market peak, promotions in supermarkets are important for selling the large quantities available.<sup>89</sup>

Table grapes are perishable and can generally be stored for only 4-6 weeks.<sup>90</sup> Producers have an incentive to bring their grapes to market earlier rather than later in order to avoid competition with other sources<sup>91</sup> and ship the table grapes before they deteriorate.<sup>92</sup> Moreover, the federal marketing order's April 20 start date provides an additional incentive for importers to import table grapes from Chile earlier in the season.<sup>93</sup>

#### **D. Chile - Material Injury**

##### **1. Volume of Subject Imports**

The volume of subject imports from Chile was 96.6 million pounds in 1998, 79.8 million pounds in 1999, and 131.8 million pounds in 2000.<sup>94</sup> These imports' U.S. market share was 4.9 percent in 1998, 3.7 percent in 1999, and 5.7 percent in 2000 in terms of quantity.<sup>95</sup> When viewed in isolation, these volumes could be considered significant. However, as discussed above, there is very limited competition between the subject imports from Chile and domestic table grapes because the vast majority of subject imports from Chile are generally shipped in the U.S. market during April,<sup>96</sup> while the great majority of U.S. production and shipments of table grapes occur considerably later in the year. The limited competition that does occur is further attenuated because the subject imports from Chile are generally lower quality end of season table grapes.<sup>97</sup> Given the limited and attenuated competition between the subject imports and the domestic like product, we do not find that the volume of subject imports from Chile is significant.<sup>98</sup> Moreover, as discussed later, due to this limited competition, the record does not provide a reasonable indication that subject imports from Chile are having a negative price effect or adverse impact on the domestic industry producing all table grapes.

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<sup>88</sup> CR at V-4, PR at V-3.

<sup>89</sup> CR at V-4, PR at V-3.

<sup>90</sup> Tr. at 34. While petitioners assert that table grapes grown at lower temperatures can be stored for longer periods, the record indicates that table grapes stored for longer periods are less competitive and there appears to be no incentive for importers to store table grapes for long periods. Tr. at 135 (Mr. Bown); Tr. at 143; Tr. at 143 (Mr. Eastes). See also INV-Y-117, June 8, 2001, at 1-4 (indicating shipments of Chilean grapes are generally insignificant in May); CR at I-10, PR at I-6.

<sup>91</sup> CR at I-10, PR at I-6; Tr. at 106.

<sup>92</sup> See Tr. at 87-88.

<sup>93</sup> See Tr. at 51-52 (Chileans try to import table grapes before April 20). See also Chileans' Postconference Brief, Exh 15 (showing over 90 percent of imports before April 20 start of marketing order).

<sup>94</sup> CR & PR at Table IV-7. The value of the subject imports was \$47.6 million in 1998, \$53.3 million in 1999, and \$65.0 million in 2000. CR & PR at Table IV-7.

<sup>95</sup> CR & PR at Table IV-9.

<sup>96</sup> INV-Y-117, June 8, 2001, at 1-4. Importers imported only very small quantities of subject imports from Chile during May in 1998, 1999, and 2000.

<sup>97</sup> See Tr. at 102, 106.

<sup>98</sup> Commissioner Hillman does not join in this finding.



## 2. Price Effects of the Subject Imports

The record indicates very limited competition between the vast majority of subject imports from Chile and the vast majority of domestic production, due to the timing of the subject imports' presence in the market.<sup>99</sup> Pricing data from U.S. producers and importers indicate that there was underselling by the subject imports from Chile for the minimal period in which there is competition.<sup>100</sup> We note that there are no pricing comparisons possible for much of the season because of the absence of subject imports from Chile. However, pricing comparisons are of limited utility because they mainly involve late-season Chilean grapes and early-season domestic grapes; the quality of the grapes is not always comparable.<sup>101</sup> Underselling that occurs at the end of the Chilean season thus likely reflects quality differences. Moreover, staff could only confirm one lost revenue allegation regarding Chile.<sup>102</sup> Price trends for the domestic market indicate that prices for domestic table grapes generally increased during the period of investigation.<sup>103</sup>

Based on the very limited competition between subject imports from Chile and the domestic like product, we find that subject imports have not depressed domestic prices to a significant degree or prevented price increases which otherwise would have occurred to a significant degree.

## 3. Impact of the Subject Imports

The Commission must evaluate the industry as a whole; that is, *all* domestic producers of table grapes.<sup>104</sup> Several indicators of the condition of the industry improved during the period of investigation.<sup>105</sup> The domestic industry's production and shipments generally rose<sup>106</sup> and the domestic

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<sup>99</sup> INV-Y-117, June 8, 2001, at 1-4. Importers shipped only very small quantities of subject imports from Chile during May in 1998, 1999, and 2000. Competition is further attenuated during May because late-season Chilean grapes tend to be seeded, which compete to a lesser degree with seedless table grapes. *See* Chilean Respondents' Postconference Brief, Exh. 32; CR & PR at Table V-3; Tr. at 106 (Red Globe seeded table grapes harvested late in Chilean season).

<sup>100</sup> *See* CR & PR at Table V-4. Chilean subject imports undersold domestic table grapes in 22 of the 26 price comparisons. CR & PR at Table V-4.

<sup>101</sup> *See* CR & PR at Tables V-1 and V-2. Purchasers indicated that "new" domestic grapes were competing with old Chilean grapes not of comparable quality. *See* CR at V-15 to V-18. Moreover, quantities of the domestic product and subject imports from Chile in the price comparisons were generally smaller for Chilean subject imports and the comparisons do not account for volume discounts offered by the domestic producers. CR at V-5, PR at V-4.

<sup>102</sup> *See* CR & PR at Tables V-5 and V-6. Many of the allegations were disputed by purchasers. *Id.*

<sup>103</sup> *See* California Table Grapes Commission Situation Reports from 1998, 1999, and 2000 (indicating average box prices increased in 1999 and 2000) (contained in Chilean Respondents' Postconference Brief, Exhs. 26, 34 and 35).

<sup>104</sup> 19 U.S.C. § 1677(4)(A).

<sup>105</sup> The record contains information from the USDA, the California Table Grape Association and Chuck Allen's Market Review. While the record contains some data specific to the "Spring" table grape producers, we are required to examine data covering the entire industry and growing season.

<sup>106</sup> U.S. producers' shipments were 1.09 billion pounds in 1998, 1.30 billion pounds in 1999, and 1.29 billion pounds in 2000. CR & PR at Table IV-7. Production also increased. *See* California Table Grapes Commission (continued...)

industry's capacity, as expressed in acreage, grew over the period of investigation.<sup>107</sup> The domestic producers' market share increased slightly from 1998 to 2000.<sup>108</sup> The average price per box rose from 1999 to 2000 to its highest price level since 1996.<sup>109</sup>

Given the perishability of this product, subject imports from Chile do not compete with the majority of U.S. producers because there are no significant domestic shipments of subject imports from Chile after May and the vast majority of the table grape industry does not begin shipping until the end of June, at the earliest.<sup>110</sup> Therefore, the vast majority of the U.S. industry – growers outside of the Coachella Valley – does not compete with the subject imports, a point petitioners concede.<sup>111</sup> Indeed, several domestic producers oppose the petition, suggesting that not only have they not been injured by reason of the subject imports, but rather that the subject imports are beneficial to the U.S. industry.<sup>112</sup>

Accordingly, we find that subject imports from Chile have not had a significant negative impact on the U.S. industry producing table grapes. We also find that the record as a whole contains clear and convincing evidence that there is no material injury by reason of subject imports from Chile and no likelihood exists that contrary evidence will arise in a final investigation.

#### **E. Chile - Threat of Material Injury**

In determining whether there is a reasonable indication of the threat of material injury in these investigations, we have considered the 2001 growing season.

The volume of subject imports from Chile increased from 1998 to 2000, as did the market penetration of subject imports.<sup>113</sup> However, data for 2001 confirm the Chilean producers' forecast that

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<sup>106</sup> (...continued)

Situation Reports from 1998, 1999, and 2000 (contained in Chilean Respondents' Postconference Brief, Exhs. 26, 34 and 35) (indicating tonnage increased in 1999 and 2000).

<sup>107</sup> Mexican Respondents' Postconference Brief, App. 8 (data from USDA NASS Noncitrus Fruits and Nuts 2000 Preliminary Summary, CASS Agricultural Overview 1998-99).

<sup>108</sup> The domestic industry's market share was 55.0 percent in 1998, 60.6 percent in 1999, and 55.4 percent in 2000. CR & PR at Table IV-9.

<sup>109</sup> See California Table Grapes Situation Report 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26).

<sup>110</sup> Mexican Respondents' Postconference Brief, App.5.

<sup>111</sup> Petitioners have acknowledged that there is no competition between the great majority of domestic product and the subject imports from Chile. Petitioners' Postconference Brief, Exh 1 at 37-38 ("Chilean imports compete only with the spring table grape producers and do not compete with summer table grape producers after June.").

<sup>112</sup> See Mexican Respondents' Postconference Brief, Exh. 17 (collecting letters from Gerawan Farming, Ranch 124 Farming, Giumarra Companies, Magnum Farming, Jamat Partnership, J. Milicic and Son, Grapery, Pandol & Sons, Stevco, Nash De Camp, Bari Produce, Pacific Trellis Fruit, Borg Produce, Andrew Williamson Sales, Anton Caratan & Son, Caymus Vineyards, and Agricare). Some domestic producers, as well as respondents, have stated that the subject imports are necessary to maintain shelf space for table grapes in supermarkets when domestic production is low. See, e.g., Tr. at 103, 154, 167, and 188.

<sup>113</sup> See CR & PR at Tables IV-7 and IV-9

exports to the United States will be lower in 2001 than in 2000.<sup>114</sup> Capacity also is not expected to increase in Chile.<sup>115</sup> All of these factors indicate no likelihood of substantially increased imports of the subject merchandise from Chile in the imminent future.<sup>116</sup>

As discussed earlier, there is very little overlap between subject imports from Chile and the domestic product because they are not present in the market at the same time. The limited competition that does exist is generally between lower-quality end of season Chilean table grapes and fresher, domestic table grapes. The record does not indicate any imminent change in this pattern.<sup>117</sup> Packout data for April 2001 indicate the likelihood of reduced domestic shipments of Chilean subject imports in competition with domestic table grapes.<sup>118</sup> Moreover, the earliest U.S. harvest, the Coachella Valley harvest, is anticipated to be later in 2001 than in 2000, further reducing the likelihood of competition in the marketplace between domestic table grapes and the subject imports from Chile.<sup>119</sup> Prices for domestic table grapes were higher overall during 2000 despite the increase in shipments of subject imports.<sup>120</sup> We thus do not find it likely that subject imports will have significant price depressing or suppressing effects given the extremely limited competition with domestic table grapes generally as well as the likely reduced level of subject imports and reduced competition with domestic table grapes in 2001.

The positive trends for the industry as a whole during the period of investigation, including increased production, shipments, capacity, and domestic prices, provide no reasonable indication that material injury to the domestic industry as a whole is imminent. As we have described, competition from the subject imports from Chile is likely to be further attenuated in 2001 due to the later harvest in the Coachella Valley and the reduced Chilean packouts in April 2001. Furthermore, reports indicate a strong growing season in the Coachella Valley with increased production.<sup>121</sup>

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<sup>114</sup> See CR & PR at Table IV-3 (Chilean packout data lower for April 2001 relative to April 2000); CR & PR at Table VII-1 (forecasting reduced subject imports in 2001).

<sup>115</sup> See CR & PR at Table VII-1.

<sup>116</sup> Unused capacity and inventories are not relevant in this investigation because producers generally operate at peak capacity and inventories cannot be maintained for significant periods due to perishability. Tr. at 34. There is no incentive for importers to store grapes for long periods. Tr. at 135 (Mr. Bown); Tr. at 143; Tr. at 143 (Mr. Eastes). Capacity utilization has no real meaning in this industry as growers operate close to capacity and consider production to be capacity. See CR & PR at Table III-4.

<sup>117</sup> See INV-Y-117, June 8, 2001, at 1-4. Given the limited scope of the investigation as well as the different growing season in the Southern Hemisphere, competition between subject imports from Chile and the vast majority of domestic production effectively *cannot* increase in the imminent future.

<sup>118</sup> See CR & PR at Table IV-3 (Chilean packout data lower for April 2001 relative to April 2000). May data is incomplete for 2001. *Id.*

<sup>119</sup> Reports indicate that the Coachella Valley harvest will be 10-12 days later in 2001 than in 2000. See Sun World expects 10 percent Jump in Coachella Grape Volume, Produce News, May 14, 2001 (attached as an exhibit to Chilean Respondents' Letter to the Commission of May 21, 2001). See also Weather May Tighten Memorial Day Supplies, The Packer, May 14, 2001 (indicating later and larger harvest in Coachella Valley).

<sup>120</sup> See California Table Grapes Situation Report 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26).

<sup>121</sup> See Sun World expects 10 percent Jump in Coachella Grape Volume, Produce News, May 14, 2001 (attached as an exhibit to Chilean Respondents' Letter to the Commission of May 21, 2001). See also Weather May Tighten Memorial Day Supplies, The Packer, May 14, 2001 (indicating later and larger harvest in Coachella

Therefore, we find that the record as a whole indicates that there is no reasonable indication of a threat of material injury by reason of subject imports from Chile and no likelihood exists that contrary evidence will arise in a final investigation. For the foregoing reasons, we find that there is no reasonable indication of a threat of material injury by reason of the subject imports from Chile.

## **F. Mexico - Material Injury**

### **1. Volume of Subject Imports**

The volume of subject imports from Mexico was 142.6 million pounds in 1998, 179.7 million pounds in 1999, and 189.4 million pounds in 2000.<sup>122</sup> These imports' U.S. market share rose from 7.2 percent in 1998 to 8.4 percent in 1999, and then fell slightly to 8.2 percent in 2000 in terms of quantity.<sup>123</sup> When viewed in isolation, these quantities could be considered significant. However, there is only limited competition between subject imports from Mexico and domestic table grapes because the vast majority of subject imports from Mexico are shipped in the U.S. market during May and June<sup>124</sup> while the great majority of U.S. production and shipments of table grapes occurs considerably later in the year, in August or later.<sup>125</sup>

Given the limited competition between subject imports from Mexico and the domestic like product, we do not find that the volume of subject imports from Mexico, both in absolute terms and relative to U.S. apparent consumption, is significant.<sup>126</sup> Moreover, as discussed later, due to this limited competition, the record does not provide a reasonable indication that subject imports from Mexico are having a negative price effect or adverse impact on the domestic industry producing all table grapes.

### **2. Price Effects of the Subject Imports**

The record indicates only limited competition between subject imports from Mexico and a substantial majority of domestic production, due to the timing of their presence in the market.<sup>127</sup> Pricing data from U.S. producers and importers indicate that there was a mixed pattern of underselling and overselling by the subject imports from Mexico for the minimal period in which there is competition between subject imports and domestic product.<sup>128</sup> We note that there are no pricing comparisons possible

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<sup>121</sup> (...continued)  
Valley).

<sup>122</sup> CR & PR at Table IV-7. The value of the subject imports was \$47.6 million in 1998, \$53.3 million in 1999, and \$65.0 million in 2000. CR & PR at Table IV-7.

<sup>123</sup> CR & PR at Table IV-9.

<sup>124</sup> INV-Y-117, June 8, 2001, at 1-4.

<sup>125</sup> INV-Y-117, June 8, 2001, at 1-4. See also CR & PR at Table III-8.

<sup>126</sup> Commissioner Hillman does not join in this finding.

<sup>127</sup> While subject imports from Mexico compete with domestic table grapes only during May and June, the domestic table grapes produced in this period constitute a small portion of total domestic table grapes production. Domestic shipments begin in May and last until December with the vast majority occurring after June. See INV-Y-117, June 8, 2001, at 1-4.

<sup>128</sup> See CR & PR at Table V-4. Mexican subject imports oversold domestic table grapes in 22 of the 48 price  
(continued...)

for much of the season because of the absence of subject imports from Mexico. Staff could only confirm five lost revenue allegations and no lost sales allegations regarding Mexico, and many of the allegations were disputed by purchasers and the lost revenue allegations confirmed were for small amounts.<sup>129</sup> Price trends for the domestic market indicate that prices for domestic table grapes generally increased during the period of investigation.<sup>130</sup>

Based on the very limited competition between the subject imports from Mexico and the domestic like product, we find that subject imports have not depressed domestic prices to a significant degree or prevented price increases which otherwise would have occurred to a significant degree.

### **3. Impact of the Subject Imports**

The Commission must evaluate the industry as whole; that is, *all* domestic producers of table grapes.<sup>131</sup> Several indicators of the condition of the domestic industry improved during the period of investigation.<sup>132</sup> The domestic industry's production and shipments generally rose,<sup>133</sup> and the domestic industry's capacity, as expressed in acreage, grew over the period of investigation.<sup>134</sup> The domestic producers' market share increased slightly from 1998 to 2000.<sup>135</sup> The average price per box rose from 1999 to 2000 to its highest level since 1996.<sup>136</sup>

Subject imports from Mexico have not had a significant impact on U.S. producers because there are no significant U.S. shipments of subject imports from Mexico that compete with the great majority of domestic production. The later season table grapes do not begin shipping until the end of June, at the earliest.<sup>137</sup> Therefore, the vast majority of the U.S. industry – growers outside the Coachella Valley – does

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<sup>128</sup> (...continued)  
comparisons. CR & PR at Table V-4.

<sup>129</sup> See CR & PR at Tables V-5 and V-6.

<sup>130</sup> See California Table Grapes Commission Situation Reports from 1998, 1999, and 2000 (indicating average box prices increased in 1999 and 2000).

<sup>131</sup> 19 U.S.C. § 1677(4)(a).

<sup>132</sup> The record contains information from the USDA, the California Table Grape Association, and Chuck Allen's Market Review. While the record contains some data specific to the "Spring" table grape producers, we are required to examine the data covering the *entire* industry and growing season.

<sup>133</sup> U.S. producers' shipments were 1.09 billion pounds in 1998, 1.30 billion pounds in 1999, and 1.29 billion pounds in 2000. CR & PR at Table IV-7. Production also increased. See California Table Grapes Commission Situation Reports from 1998, 1999, and 2000 (contained in Chilean Respondents' Postconference Brief, Exhs. 26, 34 and 35) (indicating tonnage increased in 1999 and 2000).

<sup>134</sup> Mexican Respondents' Postconference Brief, App. 8.

<sup>135</sup> The domestic industry's market share was 55.0 percent in 1998, 60.6 percent in 1999, and 55.4 percent in 2000. CR & PR at Table IV-9.

<sup>136</sup> See California Table Grapes Situation Report 2000 (contained in Chilean Respondents' Postconference Brief, Exh. 26).

<sup>137</sup> Mexican Respondents' Postconference Brief, App.5.

not compete with the subject imports, a fact the petitioners concede.<sup>138</sup> Indeed, several domestic producers oppose the petition, suggesting that not only have they not been injured by reason of the subject imports, but rather that the subject imports are beneficial to the U.S. industry.<sup>139</sup>

Accordingly, we find that subject imports from Mexico have not had a significant negative impact on the U.S. industry producing table grapes. We also find that the record as a whole indicates that there is no reasonable indication of material injury by reason of subject imports from Mexico and no likelihood exists that contrary evidence will arise in a final investigation.

#### **G. Mexico - Threat of Material Injury**

In determining whether there is a reasonable indication of the threat of material injury, we have considered the 2001 growing season.

The volume of subject imports from Mexico increased from 1999 to 2000,<sup>140</sup> although the market share of the subject imports from Mexico fell.<sup>141</sup> Capacity and production are not expected to grow significantly in Mexico.<sup>142</sup> These factors indicate no likelihood of substantially increased injurious imports of the subject merchandise from Mexico in the imminent future.<sup>143</sup>

As we have described in our material injury determination, there is a very limited overlap in competition between the subject imports and domestic table grapes because they are not present in the market at the same time as the great majority of domestic product. The limited competition that does occur is limited to May and June, a small portion of the season when only a small portion of domestic production

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<sup>138</sup> Petitioners have acknowledged that there is no competition between the other California growers and the subject imports from Mexico. *See* Petitioners' Postconference Brief, Exh 1 at 37-38 (indicating that Mexican producers bring their grapes to market as quickly as possible to avoid competing with domestic table grapes from the San Joaquin Valley). *See also* Tr. at 106 (Mexican producers avoid competing with domestic table grapes from San Joaquin Valley).

<sup>139</sup> *See* Mexican Respondents' Postconference Brief, Exh. 17 (collecting letters from Gerawan Farming, Ranch 124 Farming, Giumarra Companies, Magnum Farming, Jamat Partnership, J. Milicic and Son, Grapery, Pandol & Sons, Stevco, Nash De Camp, Bari Produce, Pacific Trellis Fruit, Borg Produce, Andrew Williamson Sales, Anton Caratan & Son, Caymus Vineyards, and Agricare). Some domestic producers, as well as respondents, have stated that the subject imports are necessary to maintain shelf space for table grapes in supermarkets when domestic production is low. *See, e.g.,* Tr. at 103, 154, 167, and 188.

<sup>140</sup> *See* CR & PR at Tables IV-7 and IV-9

<sup>141</sup> *See* CR & PR at Table IV-9.

<sup>142</sup> *See* CR & PR at Table VII-5 (capacity up slightly and production down in 2001).

<sup>143</sup> Unused capacity and inventories are not relevant in this investigation because producers generally operate at peak capacity and inventories cannot be maintained for significant periods due to the perishability of table grapes. Tr. at 34. There is no incentive for importers to store grapes because domestic table grapes grown later in the year will enter the market in large quantities. Tr. at 106. Capacity utilization has no real meaning in this industry as growers operate close to capacity and consider production to be capacity. *See* CR & PR at Table III-4.

of table grapes is present.<sup>144</sup> The record does not indicate any change in this pattern in 2001.<sup>145</sup> Prices for domestic table grapes were higher overall during 2000 despite the increase in shipments of subject imports.<sup>146</sup> We thus do not find it likely that subject imports will have significant price depressing or suppressing effects given the very limited competition between subject imports from Mexico and the domestic product.

The positive trends for the industry as a whole during the period of investigation, including increased production, shipments, capacity, and domestic prices, provide no reasonable indication that material injury to the industry as a whole is imminent. Reports also indicate a strong growing season in the Coachella Valley coupled with increased production.<sup>147</sup>

Therefore, we find that the record as a whole contains clear and convincing evidence that there is no reasonable indication of material injury by reason of subject imports from Mexico and no likelihood exists that contrary evidence will arise in a final investigation. For the foregoing reasons, we do not find a reasonable indication of a threat of material injury by reason of the subject imports from Mexico.

### CONCLUSION

For the foregoing reasons, we determine that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of table grapes from Chile or Mexico that are allegedly sold in the United States at LTFV.

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<sup>144</sup> See INV-Y-117, June 8, 2001, at 1-4.

<sup>145</sup> Moreover, given the temporal limitation on the scope of the subject imports, competition between subject imports and the great majority of subject imports effectively *cannot* increase in the imminent future.

<sup>146</sup> See Chilean Respondents' Postconference Brief, Exh. 26.

<sup>147</sup> See Sun World expects 10 percent Jump in Coachella Grape Volume, Produce News, May 14, 2001 (attached as an exhibit to Chilean Respondents' Letter to the Commission of May 21, 2001). See also Weather May Tighten Memorial Day Supplies, The Packer, May 14, 2001 (indicating later and larger harvest in Coachella Valley).

DISSENTING VIEWS OF COMMISSIONER DENNIS M. DEVANEY

Investigations Nos. 731-TA-926 and 927 (Preliminary)

SPRING TABLE GRAPES FROM CHILE AND MEXICO

Based on the record in these investigations, I find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of spring table grapes from Chile and Mexico.

I respectfully dissent from the majority's definition of the domestic like product, their definition of the domestic industry, and their determination that the domestic industry is neither materially injured nor threatened with material injury by reason of subject imports. Below, I set forth the reasoning for my conclusion that the domestic industry is threatened with material injury by reason of subject imports.

I. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. Domestic Like Product

In analyzing the domestic like product, my determination is based my determination on the factual circumstances of the case, applying the standard set forth in relevant precedent.<sup>148</sup> I have considered not only the six-factor test, but have also looked at other relevant factors based on the facts of the investigation and the transparent dividing lines between possible like products.<sup>149 150</sup>

In this investigation, I find the domestic like product to be table grapes produced during April, May or June (spring table grapes). The Commission's six-factor test, along with factors unique to the spring table grape industry, supports defining the like product to be spring table grapes rather than all table grapes.

The critical distinguishing characteristic of spring table grapes is their perishability evidenced by the rapid cooling necessary to preserve the grapes.<sup>151 152</sup> There is no interchangeability or competition between table grapes grown in the spring in the Coachella Valley and those grown in the summer in the Central

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<sup>148</sup> See, e.g., NEC Corp. v. Department of Commerce, 36 F. Supp.2d 380, 383 (Ct. Int'l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991) ("every like product determination 'must be made on the particular record at issue' and the 'unique facts of each case'"). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. See Nippon, 19 CIT at 455 n.4; Timken Co. v. United States, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996).

<sup>149</sup> See, e.g., S. Rep. No. 96-249 at 90-91 (1979).

<sup>150</sup> Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249 at 90-91 (1979) (Congress has indicated that the definition of 'like product' should not be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.").

<sup>151</sup> Petitioners' Postconference Brief, Exh. 1 at 47.

<sup>152</sup> Petitioners' Postconference Brief, Exh. 1 at 48.



Valley since the table grapes from Coachella and the Central Valley do not exist in the market at the same time.<sup>153 154</sup> Generally, the marketing and production processes of spring table grapes are different from those of summer table grapes.<sup>155</sup> Purchasers view spring table grapes as being distinct from those marketed in the summer.<sup>156</sup> The record indicates that production processes differ for spring and summer table grapes since table grapes grown in the Coachella Valley are treated with a chemical that induces dormancy in the vines, and are also sprinkled with water to create a cooler microclimate for the vines.<sup>157</sup>

In addition, the seasonal nature of the production of table grapes, temporal limitations on the product, and the perishability of table grapes are important factors that support this definition of the domestic like product.<sup>158</sup> There are very few shipments of table grapes from the Coachella Valley growers, the Mexicans, or Chileans in July, when growers in the Central Valley are beginning to ship summer table grapes.<sup>159</sup> Therefore, I believe the appropriate domestic like product is spring table grapes produced between April 1 and June 30, inclusive.

### **Whether Seeded Grapes or Seedless Grapes Constitute a Separate Like Product**

I believe that the domestic like product of spring table grapes should include two separate like products consisting of seeded spring table grapes and seedless spring table grapes. There is a continuum of physical characteristics among both seeded and seedless grapes, however, the clear dividing line between the two products is the presence or absence of seeds.

The record indicates that, generally, the only difference in physical characteristics between spring and summer table grapes is in terms of seeds. Seeded and seedless table grapes are not interchangeable because only seedless table grapes can be used in salads and other prepared foods.<sup>160</sup> Customers perceive seeded table grapes to be different from seedless table grapes and labeling of grapes as seeded or seedless in the markets indicate this difference. Evidence suggests general consumers of grapes prefer seedless table grapes and certain ethnic groups prefer seeded grapes.<sup>161</sup> Although seeded grapes and seedless grapes are produced by the same production processes and move through the same channels of distribution, customer perceptions and the higher selling price for seedless grapes indicate that they are two separate products.<sup>162 163</sup> Accordingly, I find two like products consisting of all seeded spring table grapes and all seedless spring table grapes.

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<sup>153</sup> Petitioners' Postconference Brief, Exh. 1 at 52.

<sup>154</sup> Petitioners' Postconference Brief, Exh. 1 at 52.

<sup>155</sup> Petitioners' Postconference Brief, Exh. 1 at 53.

<sup>156</sup> Petitioners' Postconference Brief, Exh. 1 at 55-57.

<sup>157</sup> Petitioners' Postconference Brief, Exh. 1 at 58-59.

<sup>158</sup> Petitioners' Postconference Brief, Exh. 1 at 30.

<sup>159</sup> Petitioners' Postconference Brief, Exh. 1 at 36.

<sup>160</sup> Chilean Respondents' Postconference Brief, Attachment 1 at 2.

<sup>161</sup> Tr. 147, 161.

<sup>162</sup> Chilean Respondents' Postconference Brief, Attachment 1 at 3.

<sup>163</sup> Chilean Respondents' Postconference Brief, Attachment 1 at 4.

**B. Domestic Industry and Related Parties**

In defining the domestic industry, the Commission's general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.<sup>164</sup> Based on my definition of the domestic like product, I define the domestic industry as all producers of spring table grapes. I further would find that appropriate circumstances do not exist to exclude any producer from the domestic industry as a related party.

**II. NEGLIGIBLE IMPORTS**

I find that the record indicates that import quantities for each of the subject countries exceeded the 3 percent statutory negligibility threshold during the pertinent period. Subject imports constituted the overwhelming majority of imports during April, May, and June of 2000.

**III. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY**

Based on the evidence in the record, I find that there is a reasonable indication that the domestic industry is threatened with material injury by reason of subject imports.

**1. Foreign Production Capacity**

Data indicates that Mexican capacity has grown over the period of investigation and that Mexican producers have the ability to increase capacity.<sup>165</sup> Chilean capacity has grown from 29 million pounds in 1997 to 56 million pounds in 2000 and there is no evidence that they will not further increase capacity.<sup>166</sup>

**2. Volume and Market Penetration of Subject Imports**

Since Mexican capacity has increased and has the potential to continue to increase, it is likely that a large majority of the increased production in Mexico will be shipped to the United States.<sup>167</sup> Mexican producers' questionnaire responses alluded to a potential reduction in home market shipments in 2001.<sup>168</sup> This is demonstrated by the fact that the United States received 76 percent of the increased Mexican shipments between 1997 and 2000.<sup>169</sup>

Another significant indication of a threat of material injury to the domestic industry comes from the Chileans attempt to expand their growing season by planting new late-season grapes, which compete directly with the domestic spring table grapes and cut into domestic producers' market share. This new practice

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<sup>164</sup> See *United States Steel Group v. United States*, 873 F. Supp. 673, 681-84 (CIT 1994), *aff'd*, 96 F.3d 1352 (Fed. Cir.1996).

<sup>165</sup> CR & PR at Table VII-5. Petitioners assert that the Mexican producers will increase capacity from 227 million pounds in 2000 to 241 million pounds in 2001 and to 252 million pounds in 2002, CR & PR at Table VII-5.

<sup>166</sup> CR & PR at Table VII-1.

<sup>167</sup> Petitioners' Postconference Brief at 36.

<sup>168</sup> Petitioners' Postconference Brief at 37.

<sup>169</sup> Petitioners' Postconference Brief at 36, CR & PR at Table VII-5.

contradicts the Chilean respondents' argument that the late harvest in 2000 was an aberration.<sup>170</sup> Therefore it seems logical to expect that the growth in imports experienced over 1997-2000 will continue.<sup>171</sup> Additionally, higher tariffs in the EU provide an incentive for the Mexican and Chilean producers to export to the United States, which imposes no tariffs.<sup>172</sup>

### **3. Inventories of Subject Imports**

Although the Chilean respondents' claim that the build-up of inventories in 2000 was an anomaly, as stated above, there is a potential threat that the Chilean producers can and will continue the practice of harvesting their crops later in the season and therefore building up inventories to ship to the U.S. in the future. Data indicates that Chilean grapes can be stored up to 90 days in Chile prior to shipment.<sup>173</sup>

### **4. Dumping Findings in Other Markets**

There are no known dumping findings involving the subject merchandise in any other markets.<sup>174</sup>

## **IV. CONCLUSION**

For the foregoing reasons, I determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of spring table grapes from Chile and Mexico.

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<sup>170</sup> Petitioners' Postconference Brief at 39.

<sup>171</sup> Petitioners' Postconference Brief at 41.

<sup>172</sup> Petitioners' Postconference Brief at 37-38.

<sup>173</sup> Petitioners' Postconference Brief at 22.

<sup>174</sup> CR at VII-1 n.2, PR at VII-1 n.2.





# California Desert Grape Administrative Committee

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## MINUTES OF COMMITTEE MEETING

A CALIFORNIA DESERT GRAPE ADMINISTRATIVE COMMITTEE MEETING WAS HELD ON THURSDAY, MAY 16, 2005, 3:15 P.M., AT FORBES AUDITORIUM, COACHELLA VALLEY WATER DISTRICT BUILDING IN COACHELLA, CALIFORNIA.

THE COMMITTEE MEMBERS PRESENT REPRESENTING PRODUCERS: MICHAEL BOZICK, ROBERT BIANCO, ANTHONY BIANCO, ALT., GORDON CHUCKIAN, HOWARD CHUCKIAN, ALT., AND PETER NELLSON, ALT. --

THE COMMITTEE MEMBERS PRESENT REPRESENTING HANDLERS: NICHOLAS JARRETT, MARION TUDOR, BLAINE CARIAN, ANTHONY BIANCO III, ALT., GARY SCARBOROUGH AND MRS PAMELA LARSON, ALT.

COMMITTEE MEMBER AT LARGE PRESENT: MIKE AITON AND DAVID FENN, ALT.

COMMITTEE PUBLIC MEMBER PRESENT: MRS BECKY BROUGHTON, ALT.

MRS. TERRY VAWTER WAS IN ATTENDANCE, REPRESENTING U.S.D.A.

DAVID CARLSON AND ROBERT FERRIER WAS IN ATTENDANCE, REPRESENTING F.S.I.S.

1. THE COMMITTEE MEETING WAS CALLED TO ORDER BY CHAIRMAN, MICHAEL BOZICK, AT 3:15 P.M.
2. THE COMMITTEE MEMBERS AND ALTERNATES REVEALED A QUORUM. THE MARKETING ORDER REQUIRES A QUORUM OF 8 MEMBERS.
3. THE CHAIRMAN ENTERTAINED A MOTION FOR APPROVAL OF THE MINUTES OF MEETING HELD ON MARCH 10, 2005, AS MAILED. ELAINE CARIAN MOVED, NICK JARRETT SECONDED AND THE COMMITTEE UNANIMOUSLY APPROVED THE MINUTES OF MEETING HELD MARCH 10, 2005, AS MAILED.
4. THE CHAIRMAN ENTERTAINED A MOTION ON A BUDGET AMENDMENT FOR THE 2005 ESTIMATED CROP YIELD TO TOTAL 7,000,000 LUGS AND THE ASSESSMENT RATE TO REMAIN AT .0175 CENTS PER LUG, BASED ON ONE 18 POUND LUG. ROBERT BIANCO MOVED, NICK JARRETT SECONDED AND THE COMMITTEE UNANIMOUSLY AGREED THAT THE



BUDGET AMMENDMENT FOR THE 2005 ESTIMATED CROP YIELD SHOULD TOTAL APPROXIMATELY 7,000,000 LUGS AND THE ASSESSMENT RATE SHOULD REMAIN AT .0175 CENTS PER LUG, BASED ON ONE 18 POUND LUG FOR THE 2005 SEASON.

5. THE CHAIRMAN ENTERTAINED DISCUSSIONS ON TWO HANDLERS WRITTEN REQUESTS, SUBMITTED AT THE MEETING, FOR SUSPENSION OF THE PACKING HOLIDAY FOR SATURDAY MAY 21, 2005. THE COMMITTEE FOLLOWED THE PROCEDURES AND SAFEGUARDS SPECIFIED BY THE COMMITTEE.

THE REASON FOR THE SUSPENSION REQUEST IS THAT THE HARVESTING BEGAN LATER THIS SEASON AND DEMAND FOR TABLE GRAPES IS VERY GOOD AT THE PRESENT TIME AND PRICES ARE HIGH AND IT WOULD NOT BE PRUDENT TO TAKE A PACKING HOLIDAY, AS THERE WOULD NOT BE ENOUGH SUPPLY IN COLD STORAGE TO EQUAL THE DEMAND FOR TABLE GRAPES.

WEATHER CONDITIONS ARE GOOD, AND THERE IS NO LABOR SHORTAGE. THE SIZE OF THE CROP SEEMS TO BE ABOUT AVERAGE, BUT THE ANTICIPATED DEMAND SEEMS TO BE UNPRECEDENTED THIS YEAR. THEREFORE THE SATURDAY PACKING HOLIDAY ON MAY, 21 2005 SHOULD BE SUSPENDED.

THE COMMITTEE DISCUSSED SUPPLIES OF COMPETING COMMODITIES TO INCLUDE QUANTITIES IN INVENTORY, THE EXPECTED DEMAND FOR GRAPES IN DIFFERENT MARKETS, WEATHER CONDITIONS, LABOR SHORTAGES/ SUPPLY, AND THE SIZE OF THE CROP REMAINING TO BE MARKETED.

OTHER MEMBERS STATED THAT THE DEMAND IS EXCEEDING SUPPLY AT THIS POINT IN TIME. THE CHAIRPERSON ASKED IF THERE WAS A LABOR SHORTAGE. NO ONE INDICATED THAT THERE WAS A SHORTAGE OF LABOR. THE INVENTORY IS ESTIMATED TO BE 7 MILLION 18- POUND LUGS OF GRAPES TO BE SHIPPED DURING THE REMAINDER OF THE SEASON. THE WEATHER HAS BEEN COOL.

THE CHAIRPERSON ENTERTAINED A MOTION FOR APPROVAL OR DISAPPROVAL OF THE HANDLERS REQUEST FOR SUSPENSION OF THE PACKING HOLIDAY FOR SATURDAY MAY 21, 2005. GARY SCARBOROUGH MOVED AND BLAINE CARIAN SECONDED WITH A VOTE OF 10 YES WITH 1 ABSTAINED, IN FAVOR OF SUSPENDING THE PACKING HOLIDAY FOR SATURDAY, MAY 21, 2005. THE COMMITTEE APPROVED SUSPENDING THE PACKING HOLIDAY FOR SATURDAY, MAY 21, 2005.

6. THE CHAIRMAN ENTERTAINED DISCUSSIONS ON ONE HANDLER'S WRITTEN REQUEST, SUBMITTED AT THE MEETING, FOR SUSPENSION OF THE PACKING HOLIDAY FOR SATURDAY MAY 28, 2005. THE COMMITTEE FOLLOWED THE PROCEDURES AND SAFEGUARDS SPECIFIED BY THE COMMITTEE.

THE COMMITTEE AGAIN DISCUSSED SUPPLIES OF COMPETING COMMODITIES TO INCLUDE QUANTITIES IN INVENTORY, THE EXPECTED DEMAND FOR GRAPES IN DIFFERENT MARKETS, WEATHER CONDITIONS, LABOR SHORTAGES/SUPPLY, AND THE SIZE OF THE CROP REMAINING TO BE MARKETED.

THE SUPPLY, DEMAND, WEATHER CONDITIONS, SIZE OF THE CROP REMAINING TO BE MARKETED, LABOR AVAILABILITY AND OTHER PERTINENT FACTORS WERE DISCUSSED.

ONE MEMBER EXPRESSED CONCERN THAT PICKING AND PACKING GRAPES ON SATURDAY COULD RESULT IN AN EXCESSIVE SUPPLY OF GRAPES AND COULD DRIVE THE MARKET PRICE DOWNWARD.

ANOTHER MEMBER COMMENTED THAT THIS WAS AN UNUSAL HARVEST WITH MILD TEMPERATURES AND A LATE SEASON. SOME MEMBERS COMMENTED THAT THEY WOULD NOT BE PICKING ON SATURDAY EVEN IF THE PACKING HOLIDAY WAS SUSPENDED.

THE CHAIRPERSON ENTERTAINED A MOTION TO SUSPEND OR NOT SUSPEND THE PACKING HOLIDAY FOR MAY 28, 2005.

GARY SCARBOROUGH MOVED AND BLAINE CARIAN SECONDED WITH A VOTE OF 10 YES AND 1 NO, IN FAVOR OF SUSPENDING THE PACKING HOLIDAY FOR SATURDAY, MAY 28, 2005. THE COMMITTEE APPROVED SUSPENDING THE PACKING HOLIDAY FOR SATURDAY, MAY 28, 2005.

7. THERE WAS NO OTHER BUSINESS.

8. THE CHAIRMAN ENTERTAINED A MOTION TO ADJOURN THE MEETING. BLAINE CARIAN MOVED TO ADJOURN, NICK JARRETT SECONDED AND THE COMMITTEE UNANIMOUSLY AGREED TO ADJOURN. THE MEETING ADJOURNED AT 3:45 P.M.

RESPECTFULLY SUBMITTED,

MAY 21, 2005

  
LARRY EDGE, MANAGER, CDGAC



# California Desert Grape Administrative Committee

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## MINUTES OF COMMITTEE MEETING

A CALIFORNIA DESERT GRAPE ADMINISTRATIVE COMMITTEE MEETING WAS HELD ON THURSDAY, MAY 31, 2005, 3:00 P.M., AT FORBES AUDITORIUM, COACHELLA VALLEY WATER DISTRICT BUILDING IN COACHELLA, CALIFORNIA.

THE COMMITTEE MEMBERS PRESENT REPRESENTING PRODUCERS: MICHAEL BOZICK, ROBERT BIANCO, GORDON CHUCHIAN, PAMELA LARSON, ALT. AND PETER NELSON, ALT.

THE COMMITTEE MEMBERS PRESENT REPRESENTING HANDLERS: NICHOLAS JARRETT, SUZANNE POWELL, ALT, MARION TUDOR, VLADIMIR TUDOR, ALT., BLAINE CARIAN, ANTHONY BIANCO III, ALT. AND MIKE WALLEN, ALT. (NOT SEATED).

COMMITTEE MEMBER AT LARGE PRESENT: MIKE AITON AND DAVID FENN, ALT.

COMMITTEE PUBLIC MEMBER PRESENT: MRS ELLEN WAY

MRS. TERRY VAWTER WAS IN ATTENDANCE, VIA SPEAKERPHONE, REPRESENTING U.S.D.A.

DAVID CARLSON AND ROBERT FERRIER WAS IN ATTENDANCE, REPRESENTING F.S.I.S.

COOKIE BIANCO, OF ANTHONY VINEYARDS, BAKERSFIELD WAS IN ATTENDANCE.

DARL YOUNG JR., OF W.D. YOUNG & SONS WAS IN ATTENDANCE.

1. THE COMMITTEE MEETING WAS CALLED TO ORDER BY CHAIRMAN, MICHAEL BOZICK, AT 3:09 P.M.
2. THE COMMITTEE MEMBERS AND ALTERNATES REVEALED A QUORUM. THE MARKETING ORDER REQUIRES A QUORUM OF 8 MEMBERS.
3. THE CHAIRMAN ENTERTAINED A MOTION FOR APPROVAL OF THE MINUTES OF MEETINGS HELD ON MAY 16, 2005, AS MAILED. ROBERT BIANCO MOVED, BLAINE CARIAN SECONDED AND THE COMMITTEE



UNANIMOUSLY APPROVED THE MINUTES OF MEETINGS HELD MAY 16, 2005, AS MAILED.

4. THE CHAIRMAN ENTERTAINED DISCUSSIONS ON A HANDLER REQUEST FOR SUSPENSION OF THE PACKING HOLIDAYS FOR ALL SATURDAYS FOR THE REST OF THE 2005 SEASON. THE COMMITTEE FOLLOWED THE PROCEDURES AND SAFEGUARDS SPECIFIED UNDER THE MARKETING ORDER.

THE REASONS FOR THE SUSPENSIONS REQUESTS ARE THAT THE HARVESTING BEGAN LATER THIS SEASON AND DEMAND FOR TABLE GRAPES IS VERY GOOD AT THE PRESENT TIME AND PRICES ARE HIGH AND IT WOULD NOT BE BENEFICIAL TO TAKE ANY SATURDAY PACKING HOLIDAYS, AS THERE WOULD NOT BE ENOUGH SUPPLY IN COLD STORAGE TO EQUAL THE DEMAND FOR TABLE GRAPES.

THE COMMITTEE DISCUSSED SUPPLIES OF COMPETING COMMODITIES TO INCLUDE QUANTITIES IN INVENTORY, THE EXPECTED DEMAND FOR GRAPES IN DIFFERENT MARKETS, WEATHER CONDITIONS, LABOR SHORTAGES/ SUPPLY, AND THE SIZE OF THE CROP REMAINING TO BE MARKETING. THE DEMAND IS EXCEEDING SUPPLY AT THIS POINT IN TIME. THE CHAIRMAN ASKED IF THERE WAS A LABOR SHORTAGE. NO ONE INDICATED THAT THERE WAS A SHORTAGE OF LABOR. THE INVENTORY IS ESTIMATED TO BE 5.4 MILLION 18-POUND LUGS OF GRAPES TO BE SHIPPED DURING THE REMAINDER OF THE SEASON AND PRICES ARE UP.

WEATHER CONDITIONS ARE IDEAL, AND THERE IS NO LABOR SHORTAGE. THE SIZE OF THE CROP SEEMS TO BE ABOUT AVERAGE, BUT THE ANTICIPATED DEMAND SEEMS TO BE UNPRECEDENTED THIS YEAR.

THE CHAIRMAN ENTERTAINED A MOTION ON THE HANDLERS REQUEST FOR SUSPENSION OF THE PACKING HOLIDAYS FOR THE REST OF THE 2005 SEASON. NICK JARRETT MOVED AND MARION TUDOR SECONDED AND THE COMMITTEE UNANIMOUSLY RECOMMENDED TO THE SECRETARY SUSPENSION OF THE PACKING HOLIDAYS FOR ALL SATURDAYS FOR THE REST OF THE 2005 SEASON.

5. THE CHAIRMAN ENTERTAINED DISCUSSIONS ON A HANDLER'S WRITTEN REQUEST, SUBMITTED AT THE MEETING, FOR SUSPENSION OF THE PACKING HOLIDAY FOR MONDAY JULY 4th, 2005. THE COMMITTEE FOLLOWED THE PROCEDURES AND SAFEGUARDS SPECIFIED UNDER THE MARKETING ORDER.

THE COMMITTEE AGAIN DISCUSSED SUPPLIES OF COMPETING COMMODITIES TO INCLUDE QUANTITIES IN INVENTORY, THE EXPECTED DEMAND FOR GRAPES IN DIFFERENT MARKETS, WEATHER CONDITIONS, LABOR SHORTAGES/SUPPLY, AND THE SIZE OF THE CROP REMAINING

TO BE MARKETED. THE SUPPLY, DEMAND, WEATHER CONDITIONS, SIZE OF THE CROP REMAINING TO BE MARKETED, LABOR AVAILABILITY AND OTHER PERTINENT FACTORS WERE DISCUSSED.

THE COMMITTEE AGREED THAT THE SAME CONDITIONS APPLY AS WAS DISCUSSED PRIOR FOR SUSPENSIONS OF ALL SATURDAY PACKING HOLIDAYS FOR THE REST OF THE 2005 SEASON.

THE CHAIRPERSON ENTERTAINED A MOTION ON THE HANDLER REQUEST TO SUSPEND THE PACKING HOLIDAY FOR MONDAY JULY 4th, 2005. BLAINE CARIAN MOVED AND MARION TUDOR SECONDED AND THE COMMITTEE UNANIMOUSLY RECOMMENDED TO THE SECRETARY SUSPENDING THE PACKING HOLIDAY FOR MONDAY, JULY 4th, 2005.

6. THE COMMITTEE AGREED TO CONTINUE TO SEND ELAS RIVERA PACKOUTS AND MEETINGS INFORMATION AS HE REQUESTED.

7. THERE WAS NO OTHER BUSINESS.

8. THE CHAIRMAN THOUGHT THAT IT WAS TIME THAT THEY ALL CONSIDER ELIMINATING THE MARKETING ORDER, IN THE FUTURE. HE DID NOT THINK THE MARKETING ORDER WAS REALLY DOING THE GROWERS IN THIS VALLEY ANY GOOD. HE STATED THAT 20 YEARS AGO IT DID BUT TODAY IT IS A DIFFERENT BALL GAME. HE ASKED IF ANYONE WISHED TO DISCUSS THIS AT THIS TIME.

ROBERT BIANCO STATED THAT HE STRONGLY, STRONGLY, STRONGLY DISAGREES AND THAT HE THINKS THAT IF WE OPEN IT UP LIKE THAT, IN 3, 4 OR 5 YEARS MEXICO WILL BURY US AND WILL SHIP EVERYTHING AND ANYTHING THAT THEY CAN OVER HERE AND THE MARKET MAY OR MAY NOT ADJUST AND THE COACHELLA VALLEY INDUSTRY COULD DIE BEFORE IT ADJUSTS AND THEN IT WOULD TAKE 5 YEARS TO STRAIGHTEN THINGS OUT. IT WOULD BE A CATASTROPHIC MISTAKE TO ELIMINATE THE MARKETING ORDER.

NICK JARRETT STATED THAT HE THOUGHT THAT THEY SHOULD TAKE A SMALL STEP AT A TIME AND KEEP HAVING GRAPES INSPECTED AND THEY SHOULD AMMEND THE PACKING HOLIDAYS AND TRY IT FOR ANOTHER SEASON OR TWO AT LEAST.

COOKIE BIANCO STATED THAT HE IS IN BAKERSFIELD SHIPPING A MILLION BOXES AND MOST OF THE PEOPLE DO NOT HAVE FSIS INSPECTIONS AND HE SLEEPS VERY WELL AT NIGHT KNOWING THAT THEY HAVE FSIS INSPECTIONS WITH A USDA STAMP ON THE BOX AND A CERTIFICATE. HE FEELS THAT IS A MARKET EXCELLENCE AND THE GRAPES DO NOT LOSE THEIR IDENTITY. HE ASKED, WHY TRY AND FIX SOMETHING THAT IS NOT BROKEN. HE SAID WE HAVE A GREAT RING TO PUT OUR HAT ON AND IT FEELS GOOD TO SAY THAT WE HAVE A MARKETING ORDER, ALSO WE ARE THE ONLY ONES AFFECTED BY ON THE AD: "BUY CALIFORNIA" WHEN IT COMES TO THE TABLE GRAPE

BUSINESS AND THAT BY THE TIME THEY START PICKING UP NORTH THE MEXICO DEAL IS DONE ANYWAY. THE MARKETING ORDER MEANS SOMETHING TO THE COACHELLA VALLEY.

THE CHAIRMAN STATED THAT HE THINKS THAT WE HAVE A NEW MARKETING ORDER IN PLACE, "THE CHAIN STORES" ARE TELLING YOU WHAT THEIR STANDARDS AND REQUIREMENTS ARE AND THE REQUIREMENTS HAVE CHANGED OVER THE LAST 5 YEARS. HE SAID HE THINKS THAT MEXICO WILL NOT MEET THE STANDARDS AND MEXICO IS SAYING THAT THEIR GRAPES ARE JUST AS GOOD AS THE COACHELLA VALLEY GRAPES ARE AND THEY WILL SELL THEM FOR \$2.00 LESS. HE IS NOT SAYING THAT INSPECTIONS SHOULD BE ELIMINATED. ARRANGEMENTS COULD BE MADE WITH FSIS OR SOMEBODY ELSE TO HAVE THE GRAPES INSPECTED. THE DIFFERENCE IS WHAT WE DO HERE VS WHAT THEY ARE GOING TO DO IN MEXICO. HE SAID HE IS SAYING THAT IF WE KEEP A GOOD STANDARD HERE, MEXICO WILL NOT. OUR STANDARDS WILL BE HIGHER THAN THEIRS AND THAT MEXICO WILL GO AND DO WHAT THEY USED TO DO UNTIL THE CHAIN STORES KICK THEM OUT. HE SAID IF THEY CONSIDER SOME OF THESE SOPHISTICATED CHAIN STORES THAT WE ARE DEALING WITH TODAY, THAT IF YOU SHIPPED A LOAD OF GARBAGE IN, THAT WOULD BE IT, THEY WOULD KICK YOU OUT.

BLAINE CARIAN COUNTERED THAT THE POINT THAT THE CHAIRMAN WAS MAKING WAS RIGHT, AND IF IT WOULD HAVE BEEN C.K. WHEN WE WERE STILL SHIPPING 12 MILLION AND THEY WERE SHIPPING 3 MILLION. BUT BOBBY BIANCO IS RIGHT, IN 4 YEARS, HALF OF THIS ROOM WOULD BE OUT OF BUSINESS BY THE TIME IT IS STRAIGHTENED OUT. HE THINKS THAT THE CHAIRMAN'S POINT IS TO LET MEXICO HANG THEMSELVES, THAT SOME OF THOSE GUYS IN MEXICO MAY DO A GOOD JOB, BUT ALSO MAY SHIP 8 MILLION DOWN HERE THAT ARE GOOD AND THEN 7 MILLION THAT WILL BE JUNK.

SUZANNE POWELL ASKED IF IT CAN BE AMENDED SO THAT GRADE STANDARDS STAY IN EFFECT AND REMOVE THE PICKING HOLIDAYS SO THAT THEY DID NOT HAVE TO KEEP MEETING AND VOTING TO SUSPEND THE PICKING HOLIDAYS.

THE CHAIRMAN SAID THAT COULD BE DONE AT ANOTHER MEETING.

VLADIMIR TUDOR STATED THAT ONE OF THE PROGRAMS THAT THEY TRIED TO START THIS YEAR WITH INSPECTIONS IN MEXICO, WAS THAT UNDER THE ASSUMPTION THE INSPECTORS IN MEXICO WILL PASS CERTAIN GRAPES THAT MEET U.S. NUMBER ONE AND STAMP THE GRAPES THERE. THE PERCEPTION WOULD BE FROM THE BUYERS STANDPOINT THAT AS LONG AS IT HAS A U.S. NUMBER ONE STAMP ON IT, IT IS THE SAME. HE SAID HE HONESTLY DOES NOT BELIEVE THAT GRAPES THAT HE PACKS HERE WILL BE THE SAME QUALITY AS GRAPES FROM MEXICO. HE ASKED HOW HARD IT WOULD BE TO GET THE MARKETING ORDER BACK IF IT WAS ELIMINATED.

ROBERT BIANCO STATED AND THE CHAIRMAN AGREED THAT IT WOULD BE A HELL OF A FIGHT TO GET THE MARKETING ORDER BACK. THAT THEY HAD NOT BROUGHT UP CHILE YET, AND THAT THEY WOULD BURY THIS INDUSTRY ALSO.

THE CHAIRMAN STATED THAT IF THE MARKETING ORDER BEGINNING DATE IS MOVED UP TO THE FIRST OF APRIL CHILE WOULD JUST BUILD A BIGGER WAREHOUSE TO STORE THEIR GRAPES.

ROBERT BIANCO COUNTERED THAT WHEN THE GRAPES ARE RAINED ON 4 OR 5 TIMES THAT THEY CAN'T STORE THEM THAT LONG.

DAVID FENN STATED THAT FROM SUN WORLD'S PERSPECTIVE THEIR BIGGEST PROBLEM HAS BEEN THAT IN THE PAST SUN WORLD WAS USUALLY THE ONLY ONE THAT WAS ALWAYS ASKING FOR SUSPENSIONS OF PICKING HOLIDAYS BECAUSE THEY NEEDED TO PICK MORE GRAPES. THEY WERE NOT ABLE TO GET THE VOTES TO DO SO AND SUN WORLD FEELS A LOT BETTER. HE COMMENDED THE COMMITTEE FOR SUSPENDING THE SATURDAY PICKING HOLIDAYS FOR THE REST OF THIS SEASON AND WOULD LIKE TO SEE IT FOR EVERY SEASON.

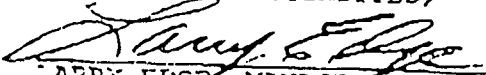
THE CHAIRMAN STATED THAT THOSE WERE THE THOUGHTS THAT HE WANTED TO HEAR AND INVITED EVERYONE TO SPEAK UP AND SAY WHAT IS ON THEIR MIND AND THEY NEEDED TO PUT IT ON THE TABLE FOR EVERYBODY'S VIEWS. HE DID NOT WANT TO DO ANYTHING THAT WAS NOT AGREED TO BY THE MAJORITY. THEY HAVE DONE VERY WELL WITH THE MARKETING ORDER AND THAT THIS WAS A VERY GOOD DISCUSSION.

9. SUZANNE POWELL ANNOUNCED THAT ROBERT BIANCO HAS BEEN SELECTED AS C.W.A.'S AGRICULTURIST OF THE YEAR THIS YEAR. THERE WILL BE AN AWARD DINNER ON JUNE 23, 2005.

10. THE CHAIRMAN ENTERTAINED A MOTION TO ADJOURN THE MEETING. PAMELA LARSON MOVED TO ADJOURN, BLAINE CARIAN SECONDED AND THE COMMITTEE UNANIMOUSLY AGREED TO ADJOURN. THE MEETING ADJOURNED AT 3:47 P.M.

RESPECTFULLY SUBMITTED,

JUNE 6, 2005

  
LARRY EDGE, MANAGER, CDGAC